TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~552.~~ 324

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, APPELLANTS,

vs.

M. E. CUTTS, ATTORNEY-GENERAL, AND WILLIAM CHRISTY, TREASURER OF THE STATE OF IOWA, AND DANIEL CAMPBELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED AUGUST 2, 1875.

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1 United States circuit court, district of Iowa.

THE CHICAGO, BURLINGTON AND QUINCY RAILroad Co.
vs.
M. E. CUTTS, ATTORNEY-GENERAL, AND OTHERS. } In equity.

TRANSCRIPT.

2 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof, begun and holden in the United States court-room, in the city of Des Moines, and district aforesaid, on the second Monday of May, it being the tenth day of May, A. D. 1875, before the Hon. John F. Dillon, United States circuit udge for the eighth circuit, and Hon. James M. Love, United States district judge for said district.

3 Be it remembered that heretofore, to wit, on the 22d day of December, A. D. 1874, the Chicago, Burlington and Quincy Railroad Company, by its attorneys, Messrs. O. H. Browning and D. Rover, filed in the clerk's office of the circuit court of the United States for the district of Iowa its præcipe for subœpna; which said præcipe is in the words and figures following, to wit:

In the circuit court of the United States for the district of Iowa, to the May term thereof, A. D. 1874.

THE CHICAGO, BURLINGTON AND MISSOURI River Railroad Company, complainant,
vs.
M. E. CUTTS, ATTORNEY-GENERAL OF THE State of Iowa, and William Christy, treasurer of the State of Iowa, and Daniel Campbell, citizens of the State of Iowa. } Bill in chancery.

4 The clerk of said court will please file the bill, issue process of subpœna thereon, returnable into said court, in accordance with law and the rules of court.

(S'g'd) O. H. BROWNING, AND
DAVID ROVER,
By D. ROVER,
Solicitors for Complainant.

DECEMBER 19, 1874.

5 Afterwards, to wit, on the 10th day of May, A. D. 1875, said complainants, by its said attorneys, filed in said clerk's offi*ts* its substituted bill of complaint in said cause; which said substituted bill is in the words and figures following, to wit:

6 UNITED STATES OF AMERICA,
District of Iowa:

To the judges of the circuit court of the United States for said district, in chancery sitting:

The Chicago, Burlington and Quincy Railroad Company, a corporation created by and existing under the laws of the State of Illinois,

located in said State of Illinois, and a citizen of said State of Illinois, brings this its bill against M. E. Cutts, attorney general of the State of Iowa, William Christy, treasurer of the State of Iowa, and Daniel Campbell, all citizens of said State of Iowa; and thereupon your orator, the Chicago, Burlington and Quincy Railroad Company, a corporation organized, existing, and doing business in the State of Illinois by virtue of the laws of said State, and which is a citizen of said State, humbly complaining, respectfully shows unto your honor that the Burlington and Missouri River Railroad Company is a corporation organized, existing, and doing business in the State of Iowa under and by virtue
7 of the laws of said State and the articles of incorporation of said company, entered into on the 15th day of January, 1852, in accordance with and by authority of said laws and amended articles of incorporation hereinafter stated.

Your orator further shows to your honor that it is the owner of and is operating a railroad in the State of Illinois extending from Chicago, on Lake Michigan, in said State, via Galesburg, to Quincy, on the Mississippi River, in said State, and to the eastern bank of said river opposite Burlington, in the State of Iowa, and which, by means of a bridge over said river, connects with the Burlington and Missouri River Railroad, hereinafter mentioned, at Burlington.

Your orator further shows to your honor that in and by said articles of incorporation granted to the said Burlington and Missouri River Railroad Company it was declared that the object of the company so formed was to construct and use a railroad extending from Bur-
8 lington to the most eligible point or points on the Missouri River, and along the most eligible routes; and in and by said articles of incorporation it was provided, among other things, that the capital stock of said company should be twelve millions dollars, divi'ed into shares of one hundred dollars each; that said corporation should have perpetual succession; that it might sue and be sued by its corporate name; that it should have a common seal; that it might make contracts, acquire and transfer property, establish by-laws, and make all rules and regulations deemed expedient in accordance with law and said articles, and do all acts which were necessary and proper to carry into full effect the object of incorporation; all which will more fully and at large appear, reference being had to said original articles of incorporation, a copy of which is herewith filed, marked "Exhibit A," and said amended articles, a copy of which is herewith filed and marked "Exhibit A A," and prayed to be taken and considered as a part of this bill.

Your orator further states that after said company had become so
9 incorporated it proceeded to and did build and construct a main line of railroad from Burlington to a point on the Kansas City, St. Joseph and Council Bluffs Railroad, about fifteen miles from Council Bluffs in Iowa, and by virtue of a lease from said last-mentioned company, acquired the privelędge of running its trains over that road into Council Bluffs, and also constructed its said road from the point aforesaid, on the Kansas City, St. Joseph and Council Bluffs Railroad to Plattsmouth on the Missouri River, a distance of about four miles from said point, mal ing two hundred and seventy-nine miles of main track of railroad thus built and constructed by said company; and said company also built and constructed, in connection with said main line of railroad, all necessary side tracks, switches, depots for freight and passengers, water-tanks round-houses, machine-shops, and all necessary appurtenances and fixtures for the operation of said railroad, and supplied said road with all the engines, tenders, cars, and rolling-stock of

every kind and character which were necessary or required for
10 the accommodation of the public in operating said road.

Your orator further represents to your honor that, in addition to said main line of said railroad, the Burlington and Missouri River Railroad Company constructed, equipped, and put in operation, as part and parcel of its said railroad, the Nebraska City Branch, extending from Red Oak to Hamburg, thirty-nine miles; and that it also assumed the pos'session and control of certain other so-called branches under leases thereof, and continued to operate the same until possession thereof was transfer'ed to your orator—the Chicago, Burlington and Quincy Railroad Company—under the agreement hereinafter mentioned; that is to say, The Creston Branch, from Creston to Hopkins, forty-four miles, constructed under and by virtue of articles of incorporation obtained by the Creston Branch of the Burlington and Missouri River Railroad Company, under the laws of Iowa, on the 24th day of July, 1871, which said articles are hereby referred to and made a part of this bill, a copy thereof being herewith filed, marked "Exhibit B," and the
11 branch from Chariton to Leon, thirty-seven miles, which was constructed under and by virtue of articles of incorporation obtained by the Burlington and Mi souri Railroad Company under the laws of Iowa, on the 24th day of July, 1871, which said articles are hereby referred to and made a part of this bill, a copy thereof being herewith filed, marked "Exhibit C;" and the Villisca Branch, extending from Villisca to Clarinda, sixteen miles, was constructed under and by virtue of articles of incorporation, under the laws of the State of Iowa, bearing date February 27th, 1872, a copy of which is hereto attached and marked "Exhibit D;" making an aggregate of four hundred and fifteen miles of railroad constructed, equipped, and put and kept in use and operation by said Burlington and Missouri River Railroad Company, under and by virtue of said several charters and the laws of Iowa aforesaid; and that ever since said roads were so constructed and equipped, they have been and still are in use and operation, and that passengers and property have been continually transported thereon, to the
12 great accom'adation and convenience of the people of said State of Iowa, and to the great benefit and advantage and prosper'ty of the country traversed by said roads.

Your orator further states to your honor that in the construction and equipment of said road and its said branches the said railroad company expended many million of dollars; and that for the purpose of raising the necessary means wherewith to accomplish the said work, it sold and disposed of shares of the capital stock of said company, for which certificates of stock have been issued to the stockholders of said company, and from time to time, as money was needed for the prosecution of the work on said road, and certain of said branches, and for the equipment thereof, the said company issued, sold, and delivered its bonds, now outstanding and unpaid, as follows, to wit: Four thousand six hundred and twenty-nine bonds of one thousand dollars each, two hundred and eighty-five bonds for four hundred dollars each, two hundred and eighty-four bonds for one hundred dollars each, and forty-three bonds
13 for fifty dollars each, all bearing date October first, A. D. eighteen hundred and sixty-three, (1863,) payable to bearer on the first day of October, A. D. eighteen hundred and ninety-three, (1893,) with seven per cent. interest thereon, payable semi-annually, for which said interest coupons are attached to said bonds; three hundred and ten bonds for one thousand dollars each, and forty-five bonds for five hundred dollars each, all bearing date July first, A. D. eighteen hundred and sixty-

nine, (1869,) payable to bearer on the first day of July, A. D. eighteen hundred and ninety-four, (1894,) with eight per cent. interest thereon, payable semi-annually, for which said interest coupons are attached to said bonds; two hundred and ninety-eight bonds for one thousand dollars each, and seventy-one bonds for five hundred dollars each, all bearing date April first, A. D. eighteen hundred and sixty-nine, (1869,) payable on the first day of April, A. D. eighteen hundred and seventy-nine, (1879,) with interest at the rate of eight per cent. per annum, payable semi-annually, for which said interest coupons are attached to
14 said bonds; five hundred and fifty bonds for one thousand dollars each, and eighty-four bonds for five hundred dollars each, all bearing date January first, A. D. eighteen hundred and sixty-seven, payable on the first day of July, A. D. eighteen hundred and seventy-five, (1875,) with interest at the rate of seven per cent. per annum, payable semi-annually, for which said interest coupons are attached to said bonds; four hundred and twenty-six bonds for one thousand dollars each, and thirty-eight bonds for five hundred dollars each, all bearing date July first, A. D. eighteen hundred and sixty-eight, (1868,) payable to bearer on the first day of July, A. D. eighteen hundred and seventy-eight, (1878,) with interest thereon at the rate of eight per cent. per annum, payable semi-annually, for which said interest coupons are attached to said bonds; four hundred and one bonds for one thousand dollars each, and twenty-nine bonds for five hundred dollars each, all bearing date July first, A. D. eighteen hundred and seventy, payable to bearer on the first day of July, A. D. eighteen hundred and eighty-nine,
15 (1889,) with interest thereon at the rate of eight per cent. per annum, payable semi-annually, for which said interest coupons are attached to said bonds; all of which will more fully and at large appear when said bonds are produced and proved as this honorable court shall direct, and to which, so produced and proved, for greater certainty, reference is hereby had.

Your orator further shows that by the laws of the State of Iowa railroad companies were authorized to issue bonds and to make mortgages and deeds of trust on the whole of their property and franchises; and that the said Burlington and Missouri River Railroad Company, for the purpose of securing the payment of the first series of bonds hereinbefore mentioned for $4,802,050, made, executed, and delivered to John W. Brooks, John U. A. Griswold, and Alpheus Hardy, as trustees for the holders of said bonds, a mortgage upon said railroad, including the right of way, depot-grounds, depots, machine-shops, and all the necessary appurtenances and fixture, rolling-stock, lands, lots, and property of every kind and description owned by said company
16 in the State of Iowa, and all the rights, powers, privileges, and franchises of the said company, which said mortgage bears date on the first day of October, A. D. 1863, and which is duly executed, acknowledged, and recorded; all which will more fully and at large appear, reference being had to said mortgage, a copy of which is herewith filed, marked "Exhibit E," and prayed to be taken and considered as a part of this bill.

Your orator further represents to your honor that to secure the payment of the second and third series of bonds herein mentioned, for $666,000, the said company made, executed, and delivered to John W. Brooks and Henry S. Russell, as trustees for the holders of said bonds, a mortgage upon the Red Oak branch of said railroad, extending from Red Oak to Hamburg, a distance of thirty-nine miles, including right of way, depot-grounds, depots, machine-shops, rolling-stock, and prop-

erty of every kind, character, and description pertaining to said Red Oak branch of said railroad, which said mortgage bears date on the first day of July, A. D. 1871, and is duly executed, acknowl-
17 edged, and recorded; all of which will more fully and at large appear reference being had to said mortgage, a copy of which is herewith filed, marked "Exhibit F," and prayed to be taken and considered as a part of this bill.

Your orator further represents to your honor that after the said railroad company had built and equipped its said road and branches, as hereinbefore set forth, and issued the stock and bonds, and executed and delivered the mortgages, as hereinbefore stated, the said company entered into a contract with your orator, a body corporate, created and existing under and by virtue of the laws of the State of Illinois, whereby the said Burlington and Missouri River Railroad Company leased in perpetuity to your orator all its said railroad and branches hereinbefore mentioned and described, and all rights of way, depot, and other lands, or other interests therein connected with said railroad or branches: all station houses, shops, offices, and other buildings and structures of whatsoever kind belonging thereto or used in connection there-
18 with, together with all fixtures and appurtenances belonging to said railroad, branches, or other property, or in any manner connected therewith; all the equipments of said railroad and branches, including engines, cars, and all other rolling-stock, and all tools, machinery, materials, and every other matter or thing connected with the equipment of said railroad or branches; all rights, privileges, and franchises of the said Burlington and Missouri River Railroad Company in and to said railroad, branches, or other property, held, used, or controlled by it, or which it might thereafter acquire or become entitled to, together with all other property of every kind and description belonging or appurtenant to said railroad, branches, and to other property, and its right, title, and interests in and to the same, and to every part thereof.

And the said Burlington and Missouri River Railroad Company, at the same time and by the same contract, sold to your orator the said Chicago, Burlington and Quincy Railroad Company, to have and
19 to hold to it and its successor and assigns forever, all the lands theretofore granted to the said Burlington and Missouri River Railroad Company by the General Government, and then remaining unsold, and amounting to about two hundred thousand acres, more or less, and all other the lands and real estate owned and possessed by it, or to which it might be or become entitled; all contracts and evidences of indebtedness received or held for land theretofore sold by it; also all monies, notes, accounts, evidences of debt, choses in action, and all other the personal property owned by it, of whatsoever kind and wheresoever situated; also all leases of branch roads or connecting roads, or any part thereof, then held and possessed by it. And in and by said agreement your orator covenant' and agreed with the said Burlington and Missouri River Railroad Company to take immediate possession of said demised railroad and other property, and keep said railroad and branches equipped, and maintain and operate the same in such manner as to furnish reasonable accommodations to the public; to pay or
20 cause to be paid all taxes and assessments that might be lawfully levied, charged, or assessed on said railroad and property, or any part thereof; to assume all leases, contracts, bonds, and other obligations of whatsoever kind; to pay and discharge all debts and liabilities of every nature, both principal and interest, as they should severally

mature; to make to the stockholders of the said Burlington and Missouri River Railroad, and of its respective branches, the same and same amount of dividends per share that it should make to its own stockholders; and to grant and secure to them respectively the same benefits and emoluments of every description that its own stockholders might receive, have, or become entitled to; all which will more fully and at large appear reference being had to said contract, a copy of which is herewith filed, marked "Exhibit G," and prayed to be taken and considered as a part of this bill. Your orator further represents to your honor that in compliance with said contract on its part it did take immediate possession of said demised railroad and branches, and
21 other property, and has from that time forward kept said railroad and branches equipped, and has maintained and operated the same in such manner as to furnish reasonable accom'odations to the public; that it has paid all taxes and assessments which have been lawfully levied, charged, or assessed on said railroad and property, or any part thereof; that it has assumed all leases, contracts, bonds, and other obligations of whatever kind; that it has become liable to pay and discharge all debts and liabilities of every nature, both principal and interest, of the said Burlington and Missouri River Railroad Company as they shall severally mature, and has paid all interest which has accrued upon said bonds and mortgages since the making of the said contract with the Burlington and Missouri River Railroad Company, as hereinbefore stated; that it has made to the stockholders of the said last-named company the same and same amount of dividends per share that it has made to its own stockholders; that it has granted and secured to them, respectively, the same benefits and emoluments of every descrip-
22 tion that its own stockholders receive or are entitled to; and that it has faithfully kept, done, and performed all things on its part to be kept, done, and performed under and by virtue of said agreement. Your orator further represents to your honor that the indebtedness of the said Burlington and Missouri River Railroad Company, which your orator the said Chicago, Burlington and Quincy Railroad Company has become bound to pay, over and above the dividends to be paid to the stockholders, and the cost of keeping said road in repair and operation, amounts to the sum of $7,353,950, for which bonds have been issued and mortgages given by the said Burlington and Missouri River Railroad Company, as hereinbefore stated, all of which said bonds and mortgages are still outstanding and unpaid, and for the payment of the principal and interest of which your orator is still liable; and that the stock belonging to the stockholders of the said Burlington and Missouri River Railroad Company, upon which your orator is obligated to pay
23 dividends, amounts to the further sum of $6,532,552.76, and that the means upon which your orator relies, and upon which it has a right to rely, for the payment of said indebtedness and the interest thereon, and for the payment of dividends to said stockholders, are the earnings of the said Burlington and Missouri River Railroad, and if deprived of said earnings, or if compelled to operate said road under rules and regulations which will materially diminish its receipts, your orator will be unable to keep said road in repair and successful operation, and to pay said debt and interest and dividends to said stockholders, as it has heretofore done.

Your orator further shows to your honor that under the provisions of the laws of Iowa which existed and were in force when said company was incorporated, and when the money with which said railroad and branches were built and equipped was borrowed, and to secure the

repayment of which said bonds and mortgages were executed by said railroad company, and by the terms of the charter of incorporation, said company had the right to fix, determine, and establish the tariff
24 of rates for the transportation of freight and passengers over its said road and branches, and that it has always heretofore exercised that right without question of its power or authority to do so; which said franchise, right, power, and authority so to fix, regulate, and determine the rates of transportation over said road and branches were by the contract hereinbefore set out between your orator and the said Burlington and Missouri River Railroad Company, set over and assigned to your orator in as full and ample a manner as they were held and enjoyed by the said last-named company, and your orator has, since the making of said contract, exercised and enjoyed said franchise, right, and privilege, and has fixed and established the tariff of charges for transportation over said road and branches, and has heretofore operated said road and branches and is now operating the same under said tariff, which said tariff has been adjusted with a view to furnishing to the country the greatest facilities of transportation and at the lowest
25 rates compatible with the duty of the company to keep the road in good condition and repair, and provided with the necessary depots, freight-houses, machine-shops, engines, cars, &c., to meet the demands of business, and to provide the means for defraying the expenses of operating said road, paying the interest upon its indebtedness, and earning reasonable dividends for the stockholders of said company; and the earnings of said road, under the operations of the tariff so established by your orator, have been barely adequate, under careful and economical management, to the purposes aforesaid and to enable the company, through the instrumentality of said road and branches, greatly to develop the resources of the country and augment the wealth and prosperity of the people; which ends could not have been attained had your orator been deprived of its just and lawful right to fix its tariff of charges for transportation and so to adjust it as to meet the varying condition and circumstances of the country and the fluctuations and necessities of trade and commerce.

26 Your orator further shows to your honor that the persons who loaned to said Burlington and Missouri River Railroad Company the money with which said railroad and branches have been constructed and equipped and put in operation, and to secure the repayment of which said bonds and mortgages were executed by said company, did so in reliance upon the earnings of said railroad and branches to refund and repay to them the money so loaned and advanced by them, together with the interest which should accrue thereon, and in the full confidence and belief that the right of said railroad company to fix and control the tariff of charges for transportation of persons and property over said road would never be denied or interfered with; and had it been known, believed, or suspected that the general assembly of the State of Iowa would attempt to deprive said company and your orator of such right, and itself claim and exercise the power of controlling the company in this regard, and of fixing the rates to be charged for transportation over said road and branches, and of changing and altering the
27 same at pleasure, irrespective of the tariffs of charges arranged and established by said company, and of compelling said company, by pains and penalties to be imposed upon its officers and employees, to adopt and conform to such rates of charges as might from time to time be prescribed by the legislature of Iowa, money for the construction of said railroad and branches could not have been

obtained, and said road and branches could not and would not have been built.

Your orator further represents to your honor that after a tariff of charges for passengers and freights upon said road had been long established, and said road had been long and successfully and acceptably operated under said tariff, and after the contract hereinbefore set forth between the said Burlington and Missouri River Railroad Company and the said Chicago, Burlington and Quincy Railroad Company had been entered into, to wit, on the 23d day of March, 1874, the general assembly of the State of Iowa passed an act entitled "An act to establish reasonable maximum rates of charges for the transportation of
28 freights and passengers on the different railroads of this State," which said act took effect and went into operation on the 4th day of July, 1874, and which said act is hereby referred to and made a part of this bill, and which provides, among other things, that all railroad corporations organized in said State, under the laws or authority thereof, shall be limited in their maximum charges to the rates of compensation for the transportation of passengers and freight which are prescribed by said act; that all railroads in the State shall be classified according to the gross amount of their respective annual earnings within the State per mile for the preceding year, as follows: Class A shall include all roads whose gross annual earnings per mile shall be $4,000. Class B shall inclue all roads whose gross annual earnings per mile shall be $3,000, or any sum in excess thereof less than $4,000; and Class C shall include all railroads whose gross annual earnings per mile shall be less than $3,000, and under the provisions of which said act an attempt
29 has been made by some officer or officers of the said State of Iowa to classify said Burlington and Missouri River Railroad, including its branches, in Class A, and to limit your orator in its charges for transportation over said road and branches to 90 per cent. on freight of the schedule of charges set forth in said act and to three cents per mile for the transportation of passengers with baggage not exceeding one hundred pounds in weight; and it is further provided in and by said act that any officer, agent, or employee of any railroad company operating a line of railroad within said State who shall violate any of the provisions of said act shall be guilty of a misdemeanor, and be punished by fine not less than twenty dollars nor more than one hundred dollars, or by imprisonment not less than four nor more than thirty days.

And it is further provided in and by said act that if any railroad company shall authorize, direct, cause, permit, or allow any violation of the provisions of said act by any officer, agent, or employee,
30 such company shall forfeit and pay to the person injured five times the amount of compensation or charge illegally taken or demanded, or five times the amount of damage caused, as the case may be, to be recovered in a civil action in any court or before a justice of the peace, as the case may be.

And it is further provided in and by said act that for every violation thereof by any railroad company such company shall forfeit and pay to the State of Iowa, for the use of the school fund, the sum of four hundred dollars, to be recovered in any civil action in the name of the State, and that it shall be the duty of the attorney-general of the State, and of the several district attorneys within their respective districts, to sue for and recover all sums forfeited as aforesaid.

Your orator further represents to your honor that the said Burlington and Missouri River Railroad and branches have heretofore been

managed and operated to the great advantage and convenience of the country traversed by it, and to the satisfaction and acceptance of
31 the people, under the tariff of rates established by your orator, and your orator, by the collection of said rates, and by the most careful, judicious, and economical use of its earnings, has been barely able to defray the expenses of keeping said road in repair and operation, to pay the interest upon its debts, and to make a reasonable dividend, of not exceeding ten per cent. to the stockholders of said company, which it cannot continue to do as heretofore if it shall be compelled to conform to said law, and adopt and enforce the rates of charges for the transportation of person and property therein prescribed.

Your orator further represents to your honor that the tariff of rates established by the said law of Iowa is different from the tariff established by your orator, and under which said railroad and branches have hitherto been operated, and is so at variance with the laws of trade, and with the principles which must be applied to the management of railroads to secure the ends of their creation, that the enforcement
32 of it cannot be otherwise than disastrous to the country, and deeply injurious to the creditors and stockholders of said company, and will deprive your orator of the ability to meet and pay the expenses of keeping said road in repair and successful operation, and to pay the interest upon its debt, and reasonable dividends to its stockholders, as it is its duty to do, and as it has heretofore done when permitted to manage said road in accordance with its rights, powers, and duties under the charter of said road and the laws of the State.

Your orator further states to your honor that it is advised by counsel and believes that the enforcement of the aforesaid act of the legislature of Iowa will impair the obligation of the contract entered in' between the said State of Iowa and the said railroad company by the charter of incorporation of said company and the laws in force at the time said charter was obtained, and will also impair the obligation on the contract entered into between the said Burlington and Mis-
33 souri River Railroad Company and your orator, as hereinbefore stated, and will, if enforced, deprive your orator of the means and ability to comply with its contract with the said Burlington and Missouri River Railroad Company, by keeping said roads and branches in successful operation and repair, and by paying off and discharging the indebtedness of the said last-named company; and that said law of the State of Iowa is therefore a violation of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

Your orator further represents to your honor that under and by virtue of the contract hereinbefore referred to between your orator and the said Burlington & Missouri River Railroad Company, the roads of said companies in Illinois and Iowa are under one management and control, and are operated as one road, making a continuous line of railroad from the city of Chicago, in the State of Illinois, via Burlington, in
34 Iowa, to Plattsmouth, on the Missouri River, and that something more than three-fourths of all that is carried over the said Burlington and Missouri River Railroad and branches consists of passengers, goods, wares, merchandise, and lumber, taken up outside of the said State of Iowa, and carried without breaking bulk into said States, and over said road and branches; and of passengers, grain, cattle, hogs, sheep, &c., taken up within said State and carried in the cars in which they are originally shipped, over said road and branches, and outside of said State, and discharged from said cars and delivered at various

commercial emporiums in other States of the Union. And your orator further shows to your honor that the aforesaid act of the general assembly of the State of Iowa, establishing maximum rates of charges for the transportation of freights and passengers on the different railroads of said State, is intended to and does apply to and include all passengers and freight taken up outside of said State, and carried into
35 said State and over said roads, and also to all passengers and freights taken up in said State and carried over said roads, and out of said State into other States, and also to all passengers and freights which come from beyond the limits of said State, to be carried over said roads through and across said State into other States and Territories, and is a violation of that provision of the Constitution of the United States which gives to Congress the power to regulate commerce among the several States.

Your orator further represents to your honor that after the said Burlington and Missouri River Railroad Company had with great difficulty raised the means for the commencement of work upon the said road, and had succeeded in constructing the road from Burlington to the Des Moines River, a distance of 75 miles, there remained to be constructed to reach its terminus on the Missouri River, 204 miles of said road, through a country very sparsely populated, and with but little
36 business for the employment and support of a railroad, and, in consequence thereof, said company was unable to provide the means for the further prosecution of the work on said road; and it was extremely doubtful whether the enterprise could be carried to completion, or whether the building of so much of said contemplated road as extended from the Des Moines River to the Missouri River, a distance of 204 miles, would not, for the time being, have to be abandoned as impracticable and unattainable. Under these circumstances your orator came to the aid of the said Burlington and Missouri River Railroad Company, and agreed to and did take up and convert into stock $2,400,000 of the stock-bonds of the said company, which was equivalent to a subscription by your orator of $10,000 per mile on that part of the road which remained to be built, thus furnishing a stock foundation for the issue of $18,000 per mile of mortgage bonds, which could not otherwise have been issued and negotiated, and which were, in
37 consequence of the credit thus given to said company by your orator, issued and negotiated, and by means of which said company was enabled to and did obtain money for the completion of its said railroad to the Missouri River, and to furnish and equip the same, and put and keep in operation, and which it could not have done except for the aid thus given by your orator.

Your orator further states to your honor that the sum hereinbefore stated as the indebtedness of the said Burlington and Missouri River Railroad Company truly represents the actual indebtedness of said company, in good faith incurred, and expended in the construction of its said railroad and branches, and that the amount hereinbefore stated as the aggregate amount of capital stock for which certificates of stock have been issued and delivered by said company, is the actual amount of stock in good faith subscribed and paid for by the stockholders in said company, and the proceeds of which have fairly and in good
38 faith been expended by said company in the construction and equipments of its said road and branches; and that no fictitious stock has ever been issued by said company, nor has any portion of the stock of said company ever been donated or given away by said company, to any person or persons or corporation, but that the whole amount

of stock for which certificate' have been issued by said company has been fairly subscribed and paid for in good faith, and the proceeds thereof applied to the construction and equipment of said railroad and branches; and, yet, such were the difficulties with which said railroad had to contend, in consequence of the sparseness of population, limited production, and small amount of business along the line of said railroad, and other causes, that it was never able to make a dividend to its stockholders until 1871, and then only a semi-annual dividend of four per cent.; so that down to that time the road was actually main-
39 tained and operated for the benefit of the public, at the cost and expense of the stockholders of said company; and if the aforesaid law of the said State of Iowa shall be enforced, and the control of the travel and transportation over said road and branches be taken from your orator, said road will again have to be maintained and operated at the cost and expense of the stockholders and creditors of said company or abandoned.

Your orator further represents to your honor, that by the provisions of the said act entitled "An act to establish maximum rates of charges for the transportation of freights and passengers on the different railroads of this State," and by the pretended classification of the railroads of the State, which has been under said law, but which classification was never lawfully made, your orator is required to transport freight and passengers upon its said road for less compensation than other railroads in the State are allowed to charge and receive for transporting freight and passengers for equal distances, so that by operation of said
40 law your orator is required to render service for less compensation and reward than any other railroad companies in the State are allowed for like services, although the labor, cost, and expense of transporting persons and property over your orators' said railroad are full as much per mile as the labor, cost, and expense of like and similar transportation over the railroads of companies who are allowed greater compensation therefor than your orator is, by the terms of said law, permitted to receive; and so your orator charges that said act is in conflict with and is a violation of section vi, article i, of the constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any citizens or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens," said law not being uniform but partial in its operation, discriminating
41 against your orator in favor of other railroad companies in the State, to the great wrong, injury, and oppression of your orator in the premises.

And your orator further represents to your honor, that it is provided in and by the eight' section of said act, that when any prosecution or action shall be commenced for the violation of any of the provisions of said act, it shall be the duty of the governor to employ suitable counsel, if he deem it necessary, to conduct or assist in conducting the same; and the sum of ten thousand dollars is appropriated by the said act out of any money in the treasury, for compensation of such counsel and to pay any incidental expenses necessary to carry on said prosecution or action, to be paid by the treasurer of the State, out of such appropriation, after being audited and allowed by the auditor of the State, on the certificate of the executive council.

And your orator says that your orator is a tax-payer in the said
42 State of Iowa, and as such contributes its full quota to the revenues of the State for the support of the government thereof, and for

meeting and defraying the expenses incident to the administration of the laws and the management of the public interests and affairs of the State, and that your orator is, in common with other tax-payers of the State, interested in the lawful, proper, and economical expenditure of said revenues, and in preventing a misapplication thereof.

And your orator charges that to apply the public revenues of the State, or any part thereof, in the maintenance of private litigation, and to defraying the expenses of such litigation as provided and required by said act, is illegal and unconstitutional, and unjustly increases the burden of taxation of your orator, and compels it to pay more taxes than it would be required to pay if the revenues were applied for legiti-
43 mate public purposes only; and most especially is it unjust to your orator to compel it to contribute to a fund to be expended in encouraging private individuals to institute and prosecute suits against your orator, and in defraying the expenses of prosecutions; and to enforce the provisions of said act against your orator will be unjust and oppressive, and will subject your orator to the harrassment and vexation of a multiplicity of suits, and will inflict upon your orator, and its business as a common carrier, great and irreparable injury, loss, and damage.

But now so it is, may it please your honor, that one Daniel Campbell, who is a citizen of the said State of Iowa, in utter disregard of the rights, powers, and privileges of your orator under the provisions of the charter of the said Burlington and Missouri River Railroad Company, and the contract of your orator with said company, and the constitution and the laws of Iowa, combining and confederating with divers other
44 persons, whose names are to your orator unknown, but whom your orator asks leave to make defendants to this bill when discovered, with apt words to charge them, has commenced an action against your orator in the circuit court of Henry County, Iowa, for an alleged violation of the provisions of the said act of the general assembly of the said State of Iowa, and which said suit your orator has, in accordance with the laws of the United States in such case made and provided, duly removed into the circuit court of the United States for the district of Iowa, where the same is now pending; and which said suit the said Daniel Campbell, unless restrained by the order of your honorable court, will prosecute to judgment and execution against said railroad company; and M. E. Cutts, who is a citizen of the said State of Iowa, and the attorney-general of said State, threatens to and will, unless restrained by this honorable court, commence other suits against said Burlington and Missouri River Railroad Company for alleged
45 violation of the said act of the general assembly of the said State of Iowa, and said railroad company will be harrassed with a great multiplicity of suits, and its business will be greatly and seriously injured and impaired, and the earnings and income of said railroad greatly diminished, and the bonds and mortgages aforesaid given to secure the repayment of the money with which said railroad and branches were built and equipped, will be greatly depreciated and diminished in value, and the rights, powers, and privileges of your orator, the Chicago, Burlington and Quincy Railroad Company, to which it is entitled by virtue of its aforesaid contract with the said Burlington and Missouri River Railroad Company, will be seriously violated and impaired and the revenues with which your orator has heretofore kept the said Burlington and Missouri River Railroad in repair and operation, and paid the interest upon its indebtedness and a dividend to its stockholders, will
46 be so lessened and decreased as to make it impracticable to per-

form those duties hereafter as they have been performed heretofore, and great and irreparable damage will be done to your orator, and to all the creditors, bondholders, and stockholders of the said Burlington and Missouri River Railroad Company.

In tender consideration whereof, and inasmuch as your orator is without remedy at and by the strict and direct rules of the common law, and can have adequate relief only in a court of equity, where matters of this and the like nature are properly cognizable and relievable—

To the end your orator prays that the said Daniel Campbell and M. E. Cutts, attorney-general of the said State of Iowa, and William Christy, treasurer of the said State of Iowa, and who is a citizen of said State of Iowa, may be made defendants to this bill, and duly summoned to answer the same, and required to file their answers thereto, but
47 not under oath, their oath thereto being hereby expressly waived, and that the said Daniel Campbell may be enjoined by the order of this honorable court from the further prosecution the said suit now pending in the said circuit court of the United States against your orator, and from instituting or causing to be instituted or prosecuted any other suit or suits against your orator or its officers, agents, or employees, or any suit or suits or other proceedings for the purpose of enforcing the provisions of said act of the general assembly of the State of Iowa; and that the said M. E. Cutts, attorney-general of the State of Iowa, may be enjoined and restrained by the order of this honorable court from instituting or prosecuting, and from causing to be instituted or prosecuted any suit or suits against your orator or its officers, agents, or employees or any suit or suits or other proceedings for the purpose of enforcing the provisions of the said act of the general assembly of
48 the State of Iowa against your orator; and that the said William Christy treasurer of the said State of Iowa, may be enjoined and restrained by the order of this honorable court, from paying any money from the treasury of the State upon the certificate of the executive council, or upon the certificate or order of any other officer or officers or in any other way, or upon any pretext whatever, as compensation to counsel, or to any other person to conduct or to assist in conducting prosecutions or actions commenced, or to be commenced, against your orator, for the violation of any of the provisions of said act, and from paying any money from the treasury of the State for the incidental expenses of such prosecution or prosecutions against your orator. And upon a final hearing hereof your orator prays that the said bill, passed by the general assembly of the said State of Iowa, may be held and decreed to be a violation of the Constitutions of the United States and of the State of Iowa,
49 and null and void, and that the injunctions herein prayed for may be made perpetual; and grant to your orator such other and further relief as to equity and the nature of the case may belong, and your orator as in duty bound will ever pray, &c.

O. H. BROWNING,
D. RORER,
Solicitors for Complainant.

STATE OF ILLINOIS,
Cook County, ss:

On this the thirty-first (31) day of December, A. D. eighteen hundred and seventy-four, before me, the undersigned notary public, personally came James M. Walker and Amos T. Hall, both to me well known, and respectively made oath that the said James M. Walker is president and he the said Amos T. Hall is secretary of the Chicago, Burlington and Quincy Railroad Company, complainant in the foregoing bill of com-

plaint; and that as such officers respectively they had means of
50 knowledge as to the truth of the matters stated therein; that they have read said bill of complaint, and know the contents thereof of their own knowledge and know it to be true; and that the same and each and every allegation thereof is true except as to the matters therein stated to be on information and belief, or on belief, and as to those matters they believe the same to be true.

{ LESTER O. GODDARD, NOTARIAL SEAL, NOTARY PUBLIC, COOK COUNTY, ILLS. } { Witness my hand and notarial seal the day and year first above written. }

(Signed) LESTER O. GODDARD.

Notary Public for Cook County, State of Illinois.

51 EXHIBIT A.

Articles of incorporation made and entered into this fifteenth day day *of January, A. D.* 1852, *for the construction of a railroad from Burlington to the Missouri River.*

ARTICLE 1. J. F. Tallant, Charles Mason, J. J. Childs, Wm. Endsley, David Rorer, James W. Woods, J. C. Hall, Thomas Sperry, Wm. Sunderland, P. C. Tiffany, O. McClelland, John Johnson, Lyman Cook, Henry W. Starr, J. P. Sunderland, Alphonsus Martin, G. P. Kriechbaum, A. W. Carpenter, Wm. F. Coolbaugh, Geo. Frazee, F. J. C. Peasley, Jos. T. Fales, J. F. Abrahams, Joshua Copp, T. L. Parsons, J. A. Funk, R. S. Adams, John Pierson, Wm. S. Graff, J. H. Rauch, Francis Barrch, C. H. Suelson, Thomas W. Newman, T. D. Crocker, Jarret Garner, A. D. Green, John G. Foote, Levi Hagar, J. C. Fletcher, Thomas Hedge, J. M. Swan, J. G. Law, D. Denise, E. H. Ives, J. G. Lauman, and J. S. Schramm hereby associate themselves for the construction of the above road, in common with all others who may become inter-
52 ested in accordance with these articles of incorporation, formed and adopted under and in pursuance of the 43d chapter of the code of Iowa.

ARTICLE 2. The name and style of this corporation shall be the Burlington and Missouri River Railroad Company.

ARTICLE 3. This incorporation shall commence on the date of these articles, and shall continue for fifty years. It shall have perpetual succession; may sue and be sued by its corporate name; shall have a common seal, and may alter the same at its pleasure. The interests of the stockholders shall be transferable as prescribed by the by-laws. Their private property shall be exempt from corporate debts as far as permitted by law. The corporation may make contracts, acquire and transfer property, establish by-laws, and, with these articles and in general, may do all acts which are necessary and proper to carry into effect the object of this incorporation.

53 ARTICLE 4. The affairs of this incorporation shall be managed by nine directors. The above-named incorporators shall elect the first board of directors, but as soon as fifty thousand dollars of the stock is taken, they must call a meeting of the stockholders at Burlington for the election of directors, and elections shall be held annually thereafter for the election of their successors, giving at least three weeks' notice of such election in two newspapers published in the city of Burlington.

ARTICLE 5. The directors shall continue in office until their successor' are elected and qualified. They shall appoint a treasurer and a secretary, but not from among their number. Any vacancy occurring in said board or its officers may be supplied by the board.

ARTICLE 6. All proceedings of the directors, in order to bind the
54 company, must be recorded in a book to be kept by them, which shall at all times be open to public inspection. Every contract made by them shall be under the seal of the company, and signed by the president and countersigned by the secretary.

ARTICLE 7. The capital stock of the company shall be three millions of dollars, divided into shares of one hundred dollars each. The liabilities of the company shall not at any time exceed two millions of dollars.

ARTICLE 8. In all elections each stockholder may vote in person or by proxy. He shall be entitled to one vote for each share of stock owned by him, to the extent of fifty shares, and for every five shares above the number of fifty he shall be entitled to one vote.

ARTICLE 9. The principal place of business of the company shall be at Burlington, Iowa; but the directors shall have power to transfer such place of business to any more convenient by giving notice thereof which is required by law.

55 ARTICLE 10. The object of this incorporation is to construct and use a railroad extending from Burlington to the most eligible point on the Missouri River, along the most eligible routes.

ARTICLE 11. The board of directors may cause books to be opened for the subscription of stock at such times and places as they may deem advisable.

ARTICLE 12. They are also authorized to make any arrangement which is suitable and proper with the State of Iowa for the purpose of securing the benefit of any lands which may be given to the State for the construction of the road herein contemplated.

ARTICLE 13. Special meetings of the stockholders, and all meetings of the directors themselves, may be called in such manner as shall be prescribed in the by-laws.

ARTICLE 14. The board may require of the treasurer, as well
56 as of any other officer or agent of the company, such security for the faithful discharge of their respective duties as they may deem expedient.

ARTICLE 15. They may call for installments upon the stock, to be paid at such time and places as they may direct, but not more than twenty-five per cent. on such stock can be called for in any one year, nor more than ten per cent. at any time. Such notice must be given thereof as they shall in their by-laws prescribe. If such installments are not promptly paid, the board may render the delinquent shares forfeited; but any stockholder, by surrendering his stock, may, except as against previous creditors of the company, be exonerated from all further liability.

ARTICLE 16. These articles of association may at any time be changed by the unanimous consent of the whole board of directors, or they may be changed by the vote of the stockholders at any general or special meeting, provided that not less than four weeks' notice of such
57 change, specifying its exact character, be given immediately prior to such meeting in two newspapers printed in Burlington, and in such other manner as the directors may prescribe.

Filed and recorded Jan. 23d, 1852.

GEO. W. McCLEARY,
Secretary of State.

I, Josiah T. Young, secretary of state of the State of Iowa, hereby certify that the above and foregoing is a full, true, and complete copy of the original articles of incorporation of the Burlington and Missouri River Railroad Company as filed in this office January 23d, 1852.

In testimony whereof I have hereunto set my hand and caused the great seal of the State to be affixed.

Done at Des Moines, Iowa, this 30th day of July, A. D. 1873.

[SEAL.] JOSIAH T. YOUNG,
Secretary of State.

58 EXHIBIT AA.

Amendment to articles of incorporation adopted November 25, 1853.

Articles of incorporation of the Burlington and Missouri River Railroad Company.

OFFICE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY,
Burlington, Iowa, November 25th, 1853.

In pursuance of due notice, a meeting of the stockholders in the Burlington and Missouri River Railroad Company was held this day in Burlington, Iowa, to vote upon the proposed amendments to the articles of incorporation. On motion of Mr. Starr, A. W. Carpenter was chosen chairman. On motion of Mr. Coolbaugh, O. Cock was chosen secretary.

The articles of incorporation and the proposed amendments were read, when, on motion of Mr. Starr, the proposed amendments were taken up separately and adopted unanimously as follows:

ARTICLE 6TH. All the proceedings of the directors, in order to
59 bind the company, must be recorded in a book to be kept by them, which shall be at all times open to the inspection of any stockholder, and all contracts made by them shall be in writing, under the seal of the company, and a copy thereof filed in the office of said company.

ARTICLE 8TH. In all elections each stockholder mayvote in person or by proxy, and shall be entitled to vote one vote for each share of stock owned by him.

ARTICLE 15TH. The board of directors may order installments to be paid on the stock subscribed at such times and places, and in such sums as they may direct, not exceeding five per cent. per month, and if such installments, when called for as the by-laws may direct, are not promptly paid, the amount due may be collected by suit against the delinquent stockholder, or the stock of such delinquent may be forfeited, by order of the board, to the company, together with all payments made
60 upon the same, the delinquent having been served with a written notice to that effect ten days before his stock shall be declared forfeited, or the stock of such delinquent stockholder may, by order of the board of directors be sold at auction, by giving such notice of the sale as the by-laws may prescribe, and if said stock does not sell for a sufficient sum to pay the full amount of unpaid assessment, the board of directors may sue and collect the balance.

ARTICLE 17TH. The directors may receive subscriptions to the stock of the company from any counties within this State, or from any other municipal incorporation, upon such terms and conditions as may be agreed upon by them, such counties or municipal incorporations being entitled to all the rights and privileges of individual stockholders. The board of directors may also authorize subscriptions to be made to the stock of said company, payable in real estate or other property, upon such terms and conditions as they may direct.

On motion of Mr. Coolbaugh, ordered that the secretary of this
61 meeting file with the secretary of state and the recorder of deeds of this county a copy of the proceedings of this meeting, together

with the amendments to the articles of incorporation, for record, as required by law.

On motion Mr. Coolbaugh, ordered that the proceedings of this meeting be published in the city papers.

On motion of Mr. Hall the meeting adjourned.

A. W. CARPENTER,
Chairman.

OLIVER COCK, *Secretary.*

Filed and recorded November 27th, 1853.

I, Josiah T. Young, secretary of state, State of Iowa, hereby certify that the above and foregoing is a full, true, and complete copy of the amendments to the original articles of incorporation of the Burlington and Missouri River Railroad Company, as appears on record in this office, filed November 27th, 1853.

In testimony whereof I have hereunto set my hand and caused the great seal of the State to be affixed.

62 Done at Des Moines this 30th day of July, A. D. 1873.

[SEAL.] JOSIAH T. YOUNG,
Secretary of State.

Proceedings of the board of directors of Burlington and Missouri River Railroad Co., held in Boston, April 28, 1864.

An adjourned monthly meeting of the board. Present, R. H. Forbes, J. M. Forbes, J. F. Joy, J. W. Brooks, and H. P. Kidder.

On motion of Mr. Joy, seconded by Mr. J. M. Forbes, voted unanimously that, with the consent of the absent directors, in writing, number seven of the articles of incorporation be amended by substituting the word six for two in the last sentence, so as to read—

The liabilities of the company shall not at any time exceed six millions of dollars.

On motion of Mr. Joy, seconded by Mr. J. M. Forbes, voted unanimously that, with the consent of the absent directors, in writing, number seventeen of the articles of incorporation be made number eighteen, and that a new article, to be numbered seventeen, be inserted, to

63 read as follows: "Article 17. The company shall have the power to issue preferred stock under such restrictions and limitations as the board of directors may fix."

On motion of Mr. Joy, seconded by Mr. J. M. Forbes, voted that the first mortgage to John M. Forbes, John N. A. Griswald, and H. P. Kidder, dated Oct. 1, 1863, prepared under the superintendence of the directors, and now before the board, be approved, and that the president and treasurer be, and *and* they are hereby, authorized to execute the same on the part of the company, and to issue bonds and preferred stock, according to the provisions of said mortgage.

On motion, voted to adjourn to the 29th inst., at one o'clock p. m.

Attest: J. N. DENISON,
Ass't Secretary.

The above is a true and correct copy from the records of the company.
C. E. PERKINS, *Secretary.*

The consent, in writing, of absent directors was afterwards obtained.

[B. AND M. R. R. CO. SEAL.] C. E. PERKINS, *Secretary.*

64 I hereby certify that the foregoing is a true and correct copy of the same found in mortgage book No. 14, page 522. Des Moines Co. records.

E. B. POLLOCK,
Recorder Des Moines Co., Iowa.

At an adjourned monthly meeting of the board of directors, held in the city of Boston, on the eighteenth (18) day of December, 1867, the following amendment to number seven (7) to the articles of incorporation was made, viz: On motion of Mr. Thayer, voted unanimously that, with the consent of absent directors, in writing, number seven (7) of the articles of incorporation be amended by substituting the word "six" (6) for "three" (3) in the first line, so that it shall read, the capital stock of the company shall be six millions ($6,000,000) dollars.

Attest: (Signed) J. N. DENISON,
Ass't Secretary.

The consent, in writing, of the absent directors was afterwards obtained.

(Signed) F. B. JAMES, *Secretary.*

65 At the regular meeting of the stockholders, at their office in the city of Burlington, on the twenty-third (23) day of June, 1869, the following additional changes were made, viz:

Moved by Henry Strong, that article seven (7) of the articles of incorporation be so amended as to read as follows, viz: "The authorized capital stock of the company shall be twelve million dollars, ($12,000,000,) divided into shares of one hundred dollars ($100) each. The liabilities of the company shall not at any time exceed eight million dollars, ($8,000,000.)

The motion of Mr. Strong having eight thousand three hundred and forty-nine (8,349) votes common stock for, and two thousand three hundred and fifty-five votes preferred stock for, and none against, was declared carried by the chair.

Moved by C. E. Perkins that article (10) of the articles of incorporation be, and it is hereby, amended by inserting after the word
66 "point" the word' "or points," so as to read, to the most eligible point or points on the Missouri River.

The motion of Mr. Perkins having received eight thousand three hundred and fourty-nine (8,349) votes common stock for, and two thousand three hundred and seventy-five (2,375) votes preferred stock for, and none against, was declared carried by the chair.

I hereby certify that the foregoing is a true copy of the records of the Burlington and Missouri River R. R. Co. Witness my hand and the official seal of the company this 23d day of September, 1869.

[SEAL.] FRANK B. JAMES, *Secretary.*

STATE OF IOWA,
Des Moines Co., ss:

I hereby certify that the above and foregoing is a true and correct copy of an amendment to the articles of incorporation of the B. and M. R. R. R. Co., as found recorded in chattel-mortgage record No. 1, on page 450, records Des Moines County.

C. B. POLLOCK,
Recorder Des Moines County, Iowa

67 EXHIBIT B.

Creston Branch B. and M. R. R.—Articles of incorporation.

The undersigned John W. Brooks, John N. Denison, Nathaniel Thayer, Alpheus Hardy, Robert S. Watson, John M. Forbes, and John A. Burnham, of the State of Massachusetts, and Smith H. Mallory, Chas. E. Perkins, Henry Strong, and Wm. B. Strong, of the State of Iowa, do by these presents incorporate ourselves as a railroad company, under the laws of the State of Iowa, for the purpose of building a railroad from a point on the Burlington and Missouri River Railroad, in Union County, said State, in a southwesterly direction, to the southern boundery of said State, and to adopt the following articles of incorporation:

ARTICLE 1. The name of this corporation shall be "The Creston Branch of the Burlington and Missouri River Railroad."

ARTICLE. 2. The object of this corporation is to build a rail-
68 road from a point on the Burlington and Missouri River Railroad, in Union County, Iowa, in a southwesterly direction, to the southern boundary of said State, upon such route as the board of directors may adopt, to be operated as a line of railroad from Burlington to the boundery line of the State.

ARTICLE 3. This incorporation shall commence on the date of these articles, and shall continue fifty years, and may be renewed, as by law provided. It shall have perpetual succession, and may sue and be sued by its corporate name, and shall have a common seal, which it may alter and renew at pleasure. The interest of the stockholders shall be transferable, as prescribed by the by-laws, to be adopted by the board of directors. The private property of the stockholders shall be exempt from corporate debts, as far as it is permitted by law. The corporation may make contracts, acquire and transfer property, establish by-laws, and make all rules and regulations deemed expedient, in accord-
69 ance with the law and with these articles; and it may charge such rates for the transportation of freight and passengers as it shall deem fit; and, in general, may do all acts which are necessary and proper to carry into effect the object of this incorporation.

ARTICLE 4. The business of the corporation shall be managed by a board of seven directors. The above-named corporation shall select the board of directors from their own number, who shall hold their office until their successors shall be elected at the first annual meeting of the stockholders for the election of directors, in the year 1872, as herein provided. The first annual meeting of the stockholders for the election of directors shall be held in the city of Burlington, on the Wednesday after the third Monday in June, A. D. 1872, and on the same day each year thereafter, after two weeks' previous notice shall have been given in one newspaper published at said city of Burlington.

The directors to be appointed by the corporation, or to be elected
70 thereafter by the stockholders, shall hold their office until their successors are duly elected and qualified.

ARTICLE 5. The directors shall fill vacancies in their own number, as may be by by-law prescribed. They shall manage the business of the corporation. They shall have power and authority to sell, lease, or mortgage the said proposed road, and all its rights, property, and franchises, or to consolidate the same with any other railroad company, either within or without the State of Iowa; to issue the bonds of the

corporation, signed by the proper officers thereof, for the purpose of raising money to build the said road, and to secure the same by mortgage upon the right of way, road-bed, equipment, and other property of the company. They shall also appoint a president from their own number, and a secretary and treasurer, and may also appoint a general superintendent. They shall keep a record of all their proceedings,
71 which shall be open to the inspection of the stockholders, as shall also be the stock-books and records of the corporation.

ARTICLE 6. The authorized capital stock of the company shall be one million five hundred thousand dollars, ($1,500,000,) which shall be divided into shares of one hundred ($100) each.

The liabilities of the company shall not exceed one million of dollars, ($1,000,000.)

Each share of stock shall be entitled to one vote, and stockholders may vote either in person or by proxy. The board of directors may issue preferred stock in accordance with the by-laws of the company.

ARTICLE 7. The principal place of business shall be Burlington, Iowa, which may be changed by the directors.

ARTICLE 8. The board of directors may cause books to be opened for the subscription of stock at such time and place as they may deem advisable, and may in the by-laws provide for the calling of special
72 meetings of the stockholders and of the board of directors, specifying the notice to be given thereof.

ARTICLE 9. The board of directors shall have authority to issue part-paid or full-paid certificates of stock to the amount they shall deem fit to persons subscribing for or taking the bonds of the corporation.

They shall have power, in the name of the company, to make calls for installments of stock subscribed, and to forfeit all the stock of delinquent stockholders, and to sue such delinquent stockholders upon installments called for in such manner and after such notice as the by-laws may prescribe.

ARTICLE 10. These articles may be amended by the consent, in writing, of three-fourths of all the board of directors, or by a vote of the majority of the stock, at any regular or special meeting, after three weeks' notice given in a newspaper published in Burlington, specifying the proposed amendment.

73 Witness our hands this twenty-fourth day of July, A. D. 1871.

(Signed)

J. W. BROOKS.
J. N. DENISON.
J. M. FORBES.
N. THAYER.
ALPHEUS HARDY.
R. S. WATSON.
CHAS. E. PERKINS.
HENRY STRONG.
WM. B. STRONG.
SMITH H. MALLORY.
JOHN A. BURNHAM.

EXHIBIT C.

Chariton Branch B. and M. R.—Articles of incorporation.

The undersigned, J. W. Brooks, J. N. Denison, Nathaniel Thayer, Alpheus Hardy, Robert S. Watson, John M. Forbes, and John A. Burnham, of the State of Massachusetts, S. H. Mallory, C. E. Perkins, Henry

Strong, and W. B. Strong, of the State of Iowa, do, by these presents, incorporate ourselves as a railroad company, under the laws of the State of Iowa, for the purpose of building a railroad from a point on the Burlington and Missouri River Railroad in Lucas County, in said State, in a southwesterly direction to the southern boundery of said State,
74 and do adopt the following articles of incorporation:

ARTICLE 1. The name of this incorporation shall be the Burlington and Missouri Railroad Company.

ARTICLE 2. The object of this corporation is to build and operate a railroad from a point on the Burlington and Missouri River Railroad in Lucas County, Iowa, in a southwesterly direction to the southern boundary of said State, upon such route as the board of directors may adopt, to be operated as a line of railroad from Burlington to the southern boundary-line of the State.

ARTICTE 3. This incorporation shall commence on the date of these articles, and shall continue fifty years, and may be renewed as by law provided.

It shall have perpetual succession, and may sue and be sued by its corporate name, and shall have a common seal, which it may alter and renew at pleasure.

The interest of the stockholders shall be transferable, as pre-
75 scribed by the by-laws to be adopted by the board of directors.

The private property of the stockholder shall be exempt from corporate debts, as far as it is permitted by law.

The corporation may make contracts, acquire and transfer property, establish by-laws, and make all rules and regulations deemed expedient in accordance with the law and with these articles, and may charge such rates for the transportation of freight and passengers as it shall deem fit; and, in general, may do all acts which are necessary and proper to carry into effect the object of this incorporation.

ARTICLE 4. The business of the corporation shall be managed by a board of seven directors. The above-named corporators shall select the first board of directors from among their own number, who shall hold their office until their successors shall be elected at the first annual meeting of stockholders for the election of directors in the year 1872, as herein provided.

The first annual meeting of stockholders for the election of di-
76 rectors shall be held in the city of Burlington, on the first Wednesday after the third Monday in June, A. D. 1872, and on the same day each year thereafter, after two weeks' previous notice thereof shall have been given in one newspaper published at the city of Burlington. The directors to be appointed by the corporators, or to be elected thereafter by the stockholders, shall hold their office until their successors are duly elected and qualified.

ARTICLE 5. The directors shall fill vacancies in their own number, as may be by by-law provided. They shall manage the business of the corporation. They shall have power and authority to sell, lease, or mortgage the said proposed road, and all its rights, property, and franchises, or to consolidate the same with any other railroad company, either within or without the State of Iowa; to issue the bonds of the corporation, signed by the proper officers thereof, for the purpose of raising money to build the said road, and to secure the same by a mortgage upon the right of way, road-bed, equipment, and other prop-
77 erty of the company. They shall also appoint a president from their own number, and a secretary and treasurer, and may also appoint a general superintendent. They shall keep a record of all their

proceedings, which shall be open to the inspection of stockholders, as shall also be the stock-books and records of the corporation.

ARTICLE 6. The authorized capital stock of the company shall be fifteen hundred thousand dollars, ($1,500,000,) which may be divided into shares of one hundred dollars ($100) each. The liabilities of the company shall not exceed one million ($1,000,000) of dollars. Each share of stock shall be entitled to one vote, and stockholders may vote either in person or proxy. The board of directors may issue preferred stock, in accordance with the by-laws of the company.

ARTICLE 7. The principal place of business shall be in Burlington, Iowa, which may be changed by the directors.

78 ARTICLE 8. The board of directors may cause books to be opened for the subscription of stock, at such time and place as they may deem advisable, and may, in the by-laws, provide for the calling of special meetings of the stockholders and of the board of directors, specifying the notice to be given thereof.

ARTICLE 9. The board of directors shall have authority to issue part-paid or full-paid certificates of stock, to the amount they shall deem fit, to persons subscribing for or taking the bonds of the corporation. They shall have power, in the name of the company, to make calls for installments of stock subscribed, and to forfeit all the stock of delinquent stockholders, and to sue such delinquent stockholders, upon the installments called for, in such manner and after such notice as the by-laws may prescribe.

ARTICLE 10. These articles may be amended by the consent in writing of three-fourths of all the board of directors, or by a vote of the majority of the stock at any regular or special meeting, after three

79 weeks' notice shall have been given in a newspaper published in Burlington, specifying the proposed amendment.

Witness our hands this twenty-fourth day of July, 1871.

(Signed) J. W. BROOKS.
J. N. DENISON.
N. THAYER.
R. S. WATSON.
J. M. FORBES.
ALPHEUS HARDY.
CHAS. E. PERKINS.
WM. B. STRONG.
HENRY STRONG.
S. H. MALLORY.
JOHN A. BURNHAM.

EXHIBIT D.

At a public meeting of persons interested in the construction of a railroad from Brownville, Nebraska, in a northeasterly direction, via the Nodaway Valley, to some point on the Des Moines Valley Railroad, held in the parlor of the Western House, Villisca, Iowa, on the 27th day of February, A. D. 1872, the following articles of incorporation were adopted and a company formed:

ARTICLE 1. Under the provisions of chapter fifty-two of the Code of Iowa, we, W. P. Hepburn, David Remick, H. C. Lett, John Fitz-

80 gerald, J. S. Cameron, N. L. Van Sandt, N. C. Ridenor, Samuel Crooks, Geo. H. Powers, John Barnett, M. S. Thurman, do hereby incorporate ourselves, and all other persons who may become stockholders in the Brownville and Nodaway Valley Railroad Company, into

a body corporate, with all the rights, powers, and privileges granted by the laws of Iowa and these articles.

ARTICLE 2. The name and style of this incorporation shall be the "Brownville and Nodaway Valley Railroad Company," and by that name shall have perpetual succession.

ARTICLE 3. The principal place of business of this company shall be at Clarinda, Iowa, and all stockholders' meetings and meetings of the board of directors shall be at that place.

ARTICLE 4. The object of this corporation is to locate, construct, maintain, and operate a railway, with a single and double track, with all necessary branches, fences, bridges, warehouses, elevators, steamboats, land, and such other appendages as may be deemed necessary for the convenient use and profitable management of the same, from a point on the Missouri River, opposite the city of Brownville, in the State of Nebraska; thence to the valley of the Nodaway, in Page County, Iowa; thence in a northwesterly direction to a junction with the Des Moines Valley Railroad.

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ARTICLE 5. The capital stock may be four millions of dollars, which shall be divided into shares of one hundred dollars each, and at all stockholders' meetings each share of stock shall be entitled to one vote. The stock may be subscribed for at such times and in such amounts as the board of directors may from time to time determine. The time and conditions upon which it is to be paid in shall be determined by the board of directors.

ARTICLE 6. This corporation shall commence on the 27th day of February, A. D. 1872, and shall continue fifty years, with the right of renewal and perpetual succession.

ARTICLE 7. The affairs of the company shall be managed by a board of not less than seven nor more than fifteen directors, a majority of whom, including president or vice-president, shall constitute a quorum. In the absence of the president and vice-president, two-thirds of the directors shall constitute a quorum, and they may appoint one of their number as presiding officer.

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ARTICLE 8. The officers of the company shall consist of a president, vice-president, secretary, and treasurer, and such other officers as the board of directors may deem expedient, all of whom shall be appointed by the directors.

ARTICLE 9. The board of directors shall have full power and authority to carry out the objects of this incorporation; shall have the power to fill any vacancy in the board; shall have the power to authorize the president and secretary to execute a deed of trust on the whole or any part of the property of this company to secure the payment of the bonds thereof in such amounts and upon such terms and conditions as the said directors may think best. The said directors shall have the right to consolidate, by purchase or otherwise, with any other railway. They may prescribe the manner in which this company's railway shall be used; may regulate the running and operating of trains; and shall have full and exclusive power to regulate fares and rates of toll or charges for the transportation of property or persons over this company's road.

ARTICLE 10. All certificates of stock, contracts, agreements, and bonds shall be signed by the president and secretary. No certificate of stock shall be valid unless countersigned by the transfer-agent of the company.

ARTICLE 11. The aggregate indebtedness of the company shall in no case exceed two-thirds of the capital stock authorized by these articles.

ARTICLE 12. The private property of the stockholders shall not be subject to the debts of the incorporation.

ARTICLE 13. After the year 1872 the annual meetings of stockholders shall take place on the first Wednesday of June of each year, of which at least four weeks' notice shall be mailed to each stockholder by a printed notice sent to his post-office address, informing him of the time and place of such meeting. At such annual meeting a board of directors shall be elected, who shall choose from their own number a president and vice-president, and elect a secretary and treasurer. They may also appoint such other officers and agents as the business of this company requires. Each stockholder shall be entitled to vote in person or by proxy.

ARTICLE 14. The treasurer shall be required to give bond, satisfactory to the board, as security for the faithful performance of his duties.

ARTICLE 15. This corporation may exercise all its powers and hold meetings of its board of directors in either of the cities of New York or Brownville, Nebraska.

ARTICLE 16. Any of these articles may be altered or amended by the written consent of two-thirds of the directors or by the written consent of holders of three-fourths of all the stock.

ARTICLE 17. Until the first regular meeting of the stockholders, the following-named incorporators shall constitute the board of directors: H. C. Lett, John Barnett, D. Remick, J. S. Cameron, John Fitzgerald N. C. Ridenour, N. L. Van Sandt.

Witness our hands this 27th day of February, 1872.

JOHN BARNETT.
N. L. VAN SANDT.
JOHN FITZGERAD.
J. S. CAMERON.
H. C. LETT.
N. C. RIDENOUR.
D. REMICK.

Acknowledged in due form before M. S. Thurman, notary public, on 27th of February, 1872.

CLARINDA, PAGE CO., IOWA, *April 27th*, 1872.

* * * * * * *

Mr. Cameron filed the following paper, giving a consent to a change in the articles of incorporation, to wit:

"The undersigned, directors of the Brownville and Nodaway Valley Railroad Company, hereby in writing give their consent that article 13 of the articles of incorporation of this company be changed so as to provide for the annual meeting of the stockholders of said company, on the first Monday in October, 1872, and annually thereafter.

Dated April 27th, 1872.

H. C. LETT.
N. L. VAN SANT.
D. REMICK.
JOHN FITZGARE
N. C. RIDENOUR.
J. S. CAMERON.

Which was ordered spread upon the minutes, and made an amendment to the articles of incorporation heretofore adopted.

CLARINDA, *June 27th* 1872.

* * * * * * *

Mr. Remick presented the following paper, giving consent to a change in the articles of incorporation, to wit:

To whom it may concern:

We the undersigned, directors of the Brownville and Nodaway Valley Railroad Company, hereby consent and agree to the following change in or amendment to article 17 of the articles of incorporation of this company. Said article shall be amended by adding to the board of directors Jas. C. Peasley, John G. Walker, William J. Ladd, and Eldridge D. Rand, making said article read as follows:

ARTICLE 17. Until the first regular meeting of the stockhold-
87 ers, the following-named incorporators shall constitute the board of directors, viz: H. C. Lett, John Barnett, D. Remick, J. S. Cameron, John Fitzgerald, N. C. Ridenour, N. L. Van Sandt, Jas. C. Peasley, John G. Walker, William J. Ladd, and Eldridge D. Rand.

June 27, 1872.

(Signed)

D. REMICK.
J. S. CAMERON.
N. L. VAN SANT.
JOHN FITZGERALD.
N. C. RIDENOUR.
H. C. LETT.

On motion, the above was ordered to be spread upon the minutes of the board, and was adopted as an amendment.

At a meeting of the board of directors held at the office of the secretary, in Clarinda, on the 23 day of Oct., 1872, pursuant to a call of the president, the following proceedings were had.

* * * * * * *

On motion of N. C. Ridenour, the following resolutions were adopted:

Resolved, That section 15 of the by-laws of this company be amended as to read as follows:

SECTION 15. Six members of the board of directors shall constitute a quorum.

Mr. Mallory presented the following paper, giving consent to a
88 change in the articles of incorporation of the B. and N. V. R. R. Co.; which was ordered to be filed, spread upon the minutes, published in the Page County Democrat, and a copy filed with the secretary of

fi ate by the secretary of this company for record.

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and whom it may concern:

dence e consent of the undersigned, directors of the Brownville and

or int way Valley Railroad Company, is hereby given to so change article

succes he articles of incorporation of said company that said article will as follows:

94 RTICLE 3. The principal place of business of this company will be at inda, Iowa, and all stockholders' meetings and meetings of the

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board of directors shall be held at that place or at the city of Burlington, Iowa, as the same may be authoritatively called.

Dated Oct. 23d, 1872.

(Signed)

S. H. MALLORY.
JOHN FITZGERALD.
N. L. VAN SANDT.
N. C. RIDENOUR.
C. E. PERKINS.
DAVID REMICK.
J. C. PEASLEY.
WM. J. LADD.
C. P. SQUIRES.
F. M. STUART.

EXHIBIT G.

This indenture of lease and agreement, concluded this thirty-first day of December, A. D. 1872, by and between the Burlington and
89 Missouri River Railroad Company, a corporation organized under the laws of the State of Iowa, of the first part, and the Chicago, Burlington and Quincy Railroad Company, a corporation created and organized by and under the laws of the State of Illinois, of the second part: Whereas the Chicago, Burlington and Quincy Railroad Company is the owner of and maintains and operates a line of railroad extending from Chicago to Burlington, and is also the owner of various other lines of railroad, both main and branch, situated in the States of Illinois and Iowa, with their appurtenances, and the Burlington and Missouri River Railroad Company is the owner of a main line of railroad extending from the city of Burlington to a point on the Kansas City, St. Joseph and Council Bluffs Railroad about fifteen miles from Council Bluffs, Iowa, and, in virtue of a leasehold from that company, runs its trains over that road into Council Bluffs, and is also the owner or lessee of certain branch railroads connecting with its main line, which it maintains and operates, with their appurtenances, all situated within
90 the State of Iowa; and whereas said lines of railroad of said companies, as now constructed and operated, constitute one continuous line of railroad from Chicago, by way of Burlington, to Plattsmouth and Council Bluffs, on the Missouri River; and it is believed to be for the mutual interests of the two companies that the same should be owned, maintained, and operated by a single corporation, and that, to secure this end, the stock, property, rights, privileges, and franchises of the one should be managed and controlled by the other; and whereas, with this view, meetings of the respective boards of directors of said corporations were duly called and held on the third day of October, A. D. 1872, at which the lease and agreements herein contained were considered and agreed upon, subject to ratification by the stockholders of said companies, respectively, and as a part of such agreements it was arranged that the share-values of the respective stocks should be equalized by the distribution by the said second party of twenty-five per cent. on the capital stock in the seven-per-cent. bonds of this company to its stockholders; and afterwards, at meeting
91 of stockholders of said respective corporations, duly called and held for that purpose, the terms of said lease and agreement were approved and ratified, and the execution of this instrument recommended; and at previous meetings of said respective boards of directors the presidents and secretaries of said companies were directed to ex-

ecute this agreement and carry the same into effect, provided the same should be ratified by the stockholders as aforesaid:

Now, therefore, this instrument witnesseth, that party of the first part, to accomplish the objects aforesaid, and in consideration of the stipulations and agreements herein contained to be kept and performed by said second party, has granted, demised, and leased, and does hereby grant, demise, and lease, in perpetuity to the said party of the second part, its successors and assigns forever, all and singular, its railroad situated in the State of Iowa, extending from Burlington, on the Mississippi River, to Plattsmouth, on the Missouri River, constructed, and to be constructed, and all branches connected therewith, owned or controlled by it; all rights of way, depots, and other lands or interests therein connected with said railroad or branches; all station-
92 houses, shops, offices, and other buildings and structures of whatsoever kind belonging thereto, or used in connection therewith, together with all fixtures and appurtenances belonging to said railroad, branches, or other property, or in any manner connected therewith; all the equipment of said railroad and branches, including engines, cars, and all other rolling-stock, and all tools, machinery, materials, and every other matter or thing connected with the equipment of said railroad and branches; all rights, privileges, and franchises of said party of the first part in and to the aforesaid railroad, branches, or other property now held, used, or controlled by it, or which it may hereafter acquire or become entitled to, together with all other property of every kind and description belonging or appurtenant to said railroad, branches, and to other property, and its right, title, and interest in and to the same, and to every part thereof.

And the said party of the first part, also, for the aforesaid consideration, hereby grants, bargains, sells, assigns, and transfers to said second party, its successors and assigns, all the lands heretofore granted
93 to it by the General Government now remaining unsold, and amounting to about two hundred thousand acres, more or less, and all other the lands and real estate of said first party, owned or possessed by it, or to which it may be or become entitled, and all title and interest it may have therein, all contracts, evidences of indebtedness, received or held for land heretofore sold by said party of the first part; also all monies, notes, accounts, evidences of debt, choses in action, and all other the personal property of said first party of whatsoever kind, and wheresoever situated; also all leases of branch roads or connecting roads, or any part thereof, now held and possessed by said party of the first part, to have and to hold the said leasehold premises, railroad, branches, rights, privileges, and franchises in perpetuity as aforesaid, and said lands and interests in real estate, leases, monies, contracts, evidences of debt, choses in action, and other property above mentioned or intended to be conveyed hereby to said party of the second part, its successors and assigns forever, as fully in all respects as said party of the first part might have held, used, controlled, or enjoyed, the
94 same had this instrument not been made, with full power and authority to collect, receive, have, and use all the rents, proceeds, profits, and income thereof, and all monies and revenues to be derived therefrom, and appropriate the same in such manner as it or they may deem best, and as shall be consistent with the interests thereof, with full authority to said second party, in the management and disposition of the railroad and property herein mentioned, to use the name and seal of said first party, as full in all respects as it could do had this instrument not been made.

And the said first party also agrees to keep up its corporate organization until the complete and absolute union and consolidation of the stock and properties of the two companies as contemplated by the parties shall be effected, the cost of the maintenance of such organization, however, to be paid by the second party.

The said party of the second part, in consideration of the premises, does hereby covenant and agree with the said party of the first
95 part, its successors and assigns, to take immediate possession of said demised railroad and other property herein granted, and to keep said railroad and branches equipped and maintained, and operate the same in such manner as to furnish reasonable accommodations to the public; to pay or caused to be paid all taxes and assessments that may be lawfully levied, charged, and assessed, on said railroad and property, or any part thereof; to assume all leases, contracts, bonds, and other obligations of whatsoever kind; to pay and discharge all debts and liabilities of every nature, both principal and interest, of said party of the first part, as they shall severally mature; to make the stockholders of said party of the first part and to the stockholders of its respective branches the same and same amount of dividends per share that it shall make to its own stockholders; and also grant and secure to them, respectively, the same benefits and emoluments of every description that its own stockholders may receive, have, or become entitled to; provided, however, that the holders of any of the convertible bonds of said first party who may elect to convert the same, and thus become a party to this arrangement, shall receive, by
96 way of dividend on the stock obtained by such conversion, only such pro rata conversion of any dividend declared next after such conversion as the interval between the date of such conversion and the date of the payment of such dividend bears to the interval between the last dividend of said corporation and the one in which the party so converting may be entitled to participate, and the certificate of stock to be issued on such conversion shall be qualified accordingly.

It is hereby mutually agreed by and between the parties thereto, to execute and deliver such further conveyances, papers, and authority as council shall deem necessary to more completely effect the objects sought and to carry out the intention of the parties to this instrument.

In witness whereof the parties hereto have caused this instrument to be signed by their respective presidents, and their respective seals to be hereto attached and attested by their secretaries, the day and year first above written.

Burlington and Missouri River Railroad Company,
[B. AND M. R. R. CO. SEAL.] By J. W. BROOKS, *President.*
Attest: J. N. DENISON, *Asst. Secretary.*

97 Chicago, Burlington and Quincy Railroad Company,
[C., B. AND Q. R. R. CO. SEAL.] By J. M. WALKER, *President.*
Attest: A. T. HALL, *Secretary.*

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Be it remembered that on this fourth day of January, A. D. 1873, before me, a notary public, residing in the city of Boston, county of Suffolk, and State of Massachusetts, duly commissioned by the governor of the State of Massachusetts to take acknowledgments and proofs of deeds and other instruments in writing, under seal, to be used or recorded in the State of Iowa, personally came J. W. Brooks, president

of the Burlington and Missouri River Railroad Company, who is known to me to be the person whose name is signed to the foregoing instrument, who, being by me duly sworn, deposes and says:

That he resides in the town of Milton, in the county of Nor-
98 folk and State of Massachusetts; that he is president of the Burlington, and Missouri River Railroad Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is the corporate seal of said company; that it was affixed by order of said company; and that he signed his name to said instrument by like order as president of said company, and acknowledged that he executed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

And that said company also executed said instrument as its free and voluntary act, for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal this 4th day of January, A. D. 1873.

[SEAL.] C. D. DORMAN,
Notary Public.

United States circuit court.

AT CHAMBERS, *Jan'y* 6, 1875.

Ordered, on motion of complainant, that the within and foregoing bill be filed and substituted in lieu of the original bill herein heretofore filed.

JOHN F. DILLON.

(Endorsed:) Filed May 10, 1875. George B. Corkhill, clerk.

99 And on the second day of January, A. D. 1875, the said respondents, by their attorneys, M. E. Cutts and W. H. Seevers, filed in said clerk's office their answer in said cause; which said answer is in the words and figures following, to wit:

100 UNITED STATES OF AMERICA,
District of Iowa:

THE CHICAGO, BURLINGTON & QUINCY RAILroad Company
vs.
M. E. CUTTS, ATTORNEY-GENERAL OF THE State of Iowa; Wm. Christy, State treasurer; Daniel Campbell.

In the circuit court of the United States.

Now comes M. E. Cutts, the attorney-general of the State of Iowa one of the respondents in this cause, and, answering for himself and for the respondent, William Christy, the State treasurer of said State, says:

That respondents admit that the complainant, The Chicago, Burlington and Quincy Railroad Company, is a corporation organized, existing, and doing business in the State of Illinois by virtue of the laws of that
State, and that the Burlington and Missouri River Railroad Com-
101 pany was a corporation organized under the laws of the State of Iowa, and that the said complainant is the owner of and is operating a railroad in the State of Illinois extending from Chicago, in said

State, via Galesburg, to Quincy, on the Mississippi River, in said State, and to the eastern bank of said river, opposite Burlington, in the State of Iowa. But respondents explicitly deny that, either by its charter or any law or statute of the State of Illinois or the State of Iowa, has the said complainant, the Chicago, Burlington & Quincy Railroad Company, ever been authorized to buy, lease, construct, own, or operate a railroad within the State of Iowa, or to do or transact any business within said last-named State.

Respondents admit that by the charter and amendments thereto adopted on the 23 day of June, A. D., 1869, the said Burlington & Missouri River Railroad Company was authorized to construct and use a railroad extending from Burlington to the most eligible point or points on the Missouri River, but deny that by the original charter the
102 said company was authorized to construct and operate a railroad from said city of Burlington to more than one point on the said Missouri River; all of which will appear by reference to the said charter or articles of incorporation and the amendments thereto, annexed as exhibits to complainant's bill.

Respondents admit that said railroad was constructed, in manner and form as alleged in complainant's bill, to a point on the Kansas City, St. Joseph & Council Bluffs Railroad, & from thence to Plattsmouth, a point on the Missouri River, with all necessary side-tracks, switches, depots, &c., &c.; and also that said Bur. & Missouri River R. R. Co. constructed, equipped, and put in operation, as part and parcel of its said road, as alleged in said bill, the Nebraska City branch, extending from Red Oak, a point on the main line between Burlington and Plattsmouth, to the town of Hamburg, on the Missouri River.

103 Respondents admit that the "Creston branch of the Burlington & Missouri River Railroad Company," was duly organized and incorporated under and by virtue of the laws of Iowa, for the purposes alleged and stated in complainant's bill, and as shown by the articles of incorporation, of which a copy is attached to and made a part of said bill, and that said last-named company constructed, or caused to be constructed, the railroad from Creston to Hopkins in manner and form as charged.

Respondents also admit that the "Burlington and Missouri Railroad Company" was duly organized and incorporated in manner and form as charged in the bill, and the said company constructed, or caused to be constructed, a railroad from Chariton to Leon in manner and form as charged. They further admit that Villisca branch, from Valisca to Clarinda, was constructed in manner and form as charged in the
104 bill, by the "Brownville and Nodaway Valley Railway Company," but whether the said Burlington and Missouri River Railroad Company assumed the possession and control of said branch roads as averred by complainant, respondents have no knowledge, information, or belief sufficient to enable them to either admit or deny the truth of averments relating thereto contained in said bill.

Respondents, however, do allege and aver, in relation to said branch roads and their construction, that the voters of Chariton Township, in Lucas County, in the year, A. D. 187 , voted a tax of five per cent. upon the assessed value of the taxable property to aid the said "Burlington and Missouri Railroad Company," to construct the said branch road from said town of Chariton to Leon; that said tax was duly levied by the board of supervisors of said Lucas County, and was collected and paid over by the county treasurer of said county to the said railroad
105 company, all of which was done at the instance and request of

said railroad company, and was done pursuant to and in due accordance with the statute of the State of Iowa, and by the aid thereof the said railroad was constructed.

Respondents further aver that the voters of the township' of Garden Grove and Center and the incorporate town of Leon, in Decatur County, voted in favor of a tax of five per cent. upon the assessed value of the taxable property in said townships and town to aid the said Burlington and Missouri Railroad Company to construct said branch road from Chariton to Leon; that said taxes were duly levied by the proper authorities and collected, at the same time and in the same manner as other taxes, by the county treasurer, and by him paid over to said company; all of which was done at the express instance and request of said company, and the money so collected and paid was used in the construction of said branch road from Chariton to Leon.

106 Respondent further alleges that the voters of Douglas and Spalding townships, in Union County, and the voters in the several townships of Benton, Clayton, Grant, Grove, Jackson, Marshal, Platte, & Ross, of Taylor County, voted taxes in each of said townships, respectively, to aid the said Creston branch of the Burlington & Missouri River Railroad to build the said branch road from Creston to Hopkins; that said taxes so voted in each and all of said townships were duly and legally levied by the proper authorities, and were by the respective treasurers of said counties of Union and Taylor collected and paid over to the said railroad company, and by said railroad company received, for the purpose of aiding the construction of said road. And these respondents aver that the said taxes were voted for, levied, collected, and paid over as aforesaid, at the express instance and request of the said railroad company.

107 Respondents further allege that at the express instance and request of the "Brownville and Nod'way Valley Railway Company" the voters of Nodaway Township, in Page County, voted for a tax of five per centum upon the assessed value of the taxable property in said township to aid said railroad company to construct its road from Villisca to Clarinda; that said tax was duly levied by the proper authorities, and by the treasurer of said county of Page was collected and paid over to said railroad company, and used and appropriated in the building and construction of said road through said township, and that the road so constructed is the same one referred to in complainant's bill as the "Villisca Branch," extending from Villisca to Clarinda.

Respondents aver and show to this court that by the statute of the State of Iowa under and by virtue of which townships were enabled and authorized to aid in the construction of railroads it is expressly stipulated and provided that all railroads constructed by or with the aid of any taxes levied and collected under the provisions of said

108 statute shall be subject to the control of the general assembly in regard to the management of the same and the charges for the transportation of freight and passengers thereon.

Respondents, further answering, say they are wholly ignorant of the amount of shares of stock or bonds issued, sold, and delivered by the said Burlington & Missouri River Railroad Company for the purpose of raising the necessary means wherewith to construct and equip said road and the said branches; neither have they any knowledge or belief in relation thereto sufficient to enable them to either admit or deny the allegations and averments contained in complainant's bill. But they do aver that if any shares of the capital stock of the said company, or if

any of the bonds of said company, were issued, sold and delivered to any person or persons for the purpose of raising money for the construction and equipment of the said branch roads, or either of them, as alleged in said bill, then all such shares of stock and bonds were illegally
109 issued and sold, for the reason that no power so to do was conferred upon said company, either by its charter or any of the amendments thereto, or by any law of the State; and all such shares of stock and bonds are wholly void, and constituted no valid or legal liability or obligation of said company.

Respondents, further answering, say that they have no knowledge or informatiion touching the lease alleged to have been executed by the said Burlington and Missouri River Railroad Company, other than such as is contained in the bill of complaint, and that for the purpose of this suit they are willing to admit, and do admit, that a lease was executed and that a copy thereof is annexed to said bill. But they deny that the said Burlington & Missouri River Railroad Company had any right, power, or authority to lease or sell or transfer to complainants any of the said branch roads constructed by other and different companies and corporations other than the said Burlington and Missouri River Railroad Company.

110 Respondents, further answering, admit that the said Burlington and Missouri River Railroad Company sold and conveyed to complainant, in manner and form as alleged in said bill, all lands granted to said company and all other lands, real estates, contracts, choses in action, and all other property, real and personal, owned by said company in manner and form as shown and set forth in the said lease referred to in said bill, and of which a copy is annexed as an exhibit.

But respondents aver the truth to be that the larger portion of said lands referred to by complainant as having been granted to the said Burlington and Missouri River Railroad Company by the General Government were not in fact granted to said company by the General Government, but were granted to the State of Iowa to aid in the construction of a railroad from Burlington, on the Mississippi River, to a point on the Missouri River. And the State of Iowa, by an act of the legis-
111 lature approved July 14, 1856, granted said lands to the said Burlington and Missouri River Railroad Company, under certain conditions and with certain restrictions and limitations set out at length in said act, reference to which is hereby made.

Respondents aver that, among other conditions and restrictions contained in said act of the general assembly of the State of Iowa granting said lands to the said Burlington & Missouri River Railroad Company, it was expressly provided and stipulated that said company should accept the provisions of said act by a written instrument, under the seal of said corporation, with the signature' of the proper officers, within ninety days after the passage of said act, and file the same in the office of the secretary of state; and it was further expressly provided in said act that said railroad company "shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the general assembly of Iowa not inconsistant with the provisions of
112 this act and the act of Congress making the grant."

That afterwards, to wit, on the 6th day of Sept. A. D. 1856, the said Burlington and Missouri River Railroad Company exected and filed in the office of the secretary of state a written acceptance of the said grant, with all the conditions and provisions named and contained in said a :t. a true and attested copy of which said written acceptance and assent s hereto ann xed marked "Exhibit A," and which respondents ask

may be taken and considered as a part of this answer. And respondents aver that under and by virtue of its charter the board of directors of said company were expressly authorized to make any arrangement which might be suitable and proper with the State of Iowa for the purpose of securing the benefit of any lands which might be given to the State for the construction of the road contemplated in said charter, and that the said written assent and acceptance was executed pur-
113 suant to said authority and for the express purpose of obtaining ing and securing the benefits of said land-grant.

They further aver the State of Iowa has in all respects fully complied with all the conditions named and provided for in said act, and all amendments thereto, and has conveyed to the said railroad company all of the lands granted to the State as aforesaid, amounting to over three hundred thousand acres, and the said company has received and accepted from the State such conveyances, and by the aid of the lands so granted and conveyed were enabled to raise money and means for the construction of said railroad from Burlington to the Missouri River. Respondents therefore aver that the general assembly of the State of Iowa, by virtue of the conditions and reservations contained in said act granting said lands as aforesaid, and the written assent to all of the said conditions, provisions, and reservations therein contained in manner and form as hereinbefore set forth, had full and complete
114 power and *and* authority to pass the act prescribing reasonable maximum rates of charges for transportation of freights and passengers over said railroad.

And, further answering, respondents say that they deny that either under the provisions of the charter of incorporation of said company, or of any of the amendments thereto, or under the provisions of the laws of Iowa, did the said Burlington and Missouri River Railroad Company have the exclusive right to fix, determine, and establish the tariff of rates for the transportation of freight and passengers over its said road and branches; but, on the contrary, respondents aver that such right and power has never been delegated or granted to said company, but has always been reserved to the State whenever it should choose to act in relation thereto.

Respondents admit that the general assembly of the State of Iowa, on the 23 day of March, A. D. 1874, passed an act entitled "An act to establish reasonable maximum rates of charges for the transportation of freights and passengers on the different railroads of the State,"
115 which took effect on the 4th day of July, 1874, and that said act contains the several provisions alleged and referred to in complainant's bill. They expressly deny that the tariff of rates established by the said law is so at variance with the laws of trade and with the principles that must be applied to railroads to secure the ends of their creation that the enforcement of it will be disastrous to the country or will deprive complainants of the ability to meet and pay the expense of keeping said road in repair and successful operation, and pay the interest upon its lawful and legitimate debt and reasonable dividends to its stockholders. On the contrary, these respondents explicitly aver the fact to be that under the tariff of rates fixed and specified in said statute the complainant could and can operate said road and branches and derive therefrom sufficient revenue to defray all operating expenses, including all taxes assessed, pay all the interest upon the whole
116 of its indebtedness, and reasonable dividends to its stockholders.

Respondents, therefore, aver that the provisions of said act are reasonable and just.

Respondents admit that, pursuant to the provisions of said law, the railroads of the State have been classified by the proper authorities; but they deny that such classification was, or in any respect is, unlawful or unwarranted; neither is it in any manner whatever true that complainant is by the said act, or the classification thereunder, required to transport freight and passengers upon its said road for less compensation than other railroads in the State are allowed to charge and receive for transporting freight and passengers for equal distances.

Respondents admit that in the classification of roads under the provisions of said act the said road of complainant is included in Class A, and that the persons, companies, and corporations owning or operating
117 ing roads included in Class A are prohibited from charging or receiving as large compensation for transporting freight and passengers as is allowed to be charged for transporting freight and passengers like distances upon roads included in Classes B and C. But respondents aver that complainant is permitted to charge and receive the same compensation that is permitted to be charged upon other roads in Class A for like services.

And, further answering, respondents say that by the original charter and articles of incorporation the said Burlington and Missouri River Railroad Company was only authorized to construct a railroad from the city of Burlington to the most eligible point on the Missouri River, and that by an amendment to said charter, duly adopted on the 23 day of June, A. D. 1869, the said company was authorized to build a road to more than one point upon said Missouri River; that under and by
118 virtue of the said original charter said company constructed and put in operation a railroad from Burlington to Plattsmouth, on the said Missouri River, and afterwards, under and by virtue of the said charter, as amended as aforesaid, constructed the Red Oak branch, from Red Oak to Hamburg, another point upon said Missouri River, all of which appears and is made manifest by the bill of complainant and the exhibits thereto attached, and reference to which is hereby made.

And respondents, further answering, say that under the said original charter the authorized capital stock of said Burlington and Missouri River Railroad Company was only three millions of dollars, and that by said original charter it was expressly provided that the liabilities of the company should not at any time exceed two millions of dollars; and that afterwards, to wit, on or about the 23 day of June, A. D. 1869, said charter was, by the due and proper acts of said company, so amended as
119 to authorize the said capital stock to be increased to twelve millions of dollars, and the company was authorized to increase its liabilities to an amount not exceeding eight million dollars. And respondents aver that under and by virtue of the said charter, as amended as aforesaid, the said company actually increased its capital stock to nearly or quite seven millions dollars, and increased its liabilities, existing and outstanding at the presentation, to about seven million dollars. They further aver that after the adoption of the said original charter or articles of incorporation, and prior to the adoption of any of the said amendments as hereinbefore set forth, a new constitution was adopted by the people of the State, under and by virtue of which there was specially reserved to the general assembly *by* the power to amend or repeal all laws for the organization or creation of corporations or granting of special or exclusive privileges or immunities by a
120 vote of two-thirds of each branch of the general assembly, and the general assembly, under and by virtue of said provision

of the constitution, *but* full and ample power to pass said act; and the said complainant, claiming to hold, own, possess, and control all the rights, franchises, & privileges obtained by and secured to the said Burlington and Missouri River Railroad Company by the said charter and amendments, holds, owns, possesses, and controls the same, subject to the said power of the general assembly of the State to amend or repeal said charter as amended. And especially do these respondents aver that the general assembly have the right, under said provision of the constitution, to regulate the rates of fare to be charged and exacted for transportation of freight and passengers over and upon such portion of the said road and branches as was constructed after the said charter was amended as hereinbefore stated.

And, further answering, respondents aver that the general assembly of the State of Iowa, by an act approved March 12, 1864, and which
121 took effect prior to April 20th, A. D. 1864, provided that it should be lawful for any railroad company incorporated within the State of Iowa, with the assent of the stockholders of such company, to make and issue preferred stock in payment of debts due or to become due from such company; that on the 28th day of April, A. D. 1864, and after the passage of said act, and under and pursuant to the authority and power therein conferred, the said Burlington and Missouri *Railroad River* Company adopted and incorporated into its said charter an amendment to the effect that the said company should have the power to issue preferred stock.

That afterwards the said general assembly passed an act, approved April 2, 1866, providing that any railroad company incorporated within the State of Iowa, with the assent of two-thirds of all the stockholders in interest, should have the power to make and issue preferred
122 stock in payment of debts due or to become due from such company; that afterwards, the precise date of which respondents are unable to give, the said railroad company, under and by virtue of said statute and said amendment to said charter, made & issued not less than three thousand shares of preferred stock, and thereby were enabled to build and equip its said railroad west from Chariton to the Missouri River.

And so respondents say that by the acceptance and exercise of said power as aforesaid, and by the incorporation of said amendment into its said charter, the said charter so amended became liable to amendment or repeal by the said general assembly under the power conferred by the said provision of the constitution of the State of Iowa.

And, further answering, respondents say that the said Burlington and Missouri River Railroad Company, neither by its charter and amendments thereto, nor by any act of the general assembly of the State of Iowa, nor by virtue of any law in force in said State, had any
123 right or power to sell, assign, transfer, or in any manner whatever part with, its rights or franchises granted and secured to said company by the said charter or articles of incorporation, and respondents therefore aver that, by reason of the said incapacity and inability of said railroad company to sell, assign, or transfer said franchises, rights, and privileges, the complainant in this case, the Chicago, Burlington & Quincy Railroad, derived and acquired no title or interest in and to said rights, franchises, or privileges by virtue of the said lease or contract referred to in complainant's bill, nor by virtue of any other contract or agreement made or entered into by complainants with said Burlington and Missouri River Railroad Company, and, therefore, said complainant has no right or authority, and is in no position to insist in its

own behalf, name, and right, that the said franchises, rights and
124 privileges alleged to have been granted in and by said charter have been violated by the passage of the act of the general assembly of Iowa, fixing maximum rates of charges for transportation of freights and passengers; neither has said complainant, for the reason aforesaid, any right to bring or maintain this suit in its own name and behalf to enjoin or prevent the enforcement of said law, on the ground and for the reason that by said law and its enforcement the control contained and included in said charter or articles of incorporation had been or would be impaired and violated.

Respondents, further answering, admit that the respondent Daniel Campbell has commenced an action against complainant for an alleged violation of the provisions of said act of the general assembly; but they deny that said action or suit has been transferred into the circuit court of the United States, or that the same is now pending therein; on
125 the contrary, they aver that said suit was commenced in the circuit court of the State of Iowa, in Henry County, and that the same is still pending in said court.

Respondents admit that the respondent M. E. Cutts, as the attorney-general of the State of Iowa, as by the laws of said State he is required, is about to commence other suits against complainant for violations of said act by and on the part of said complainant. But they deny in express terms that he is in any manner about to, or threatens to, commence any suits or actions against complainant for or on account of any charges made by complainant in excess of the sums or amounts named and specified in such act for transporting over its said railroad and branches any freight or passengers taken and received by complainant to be transported from any point within said State of Iowa to any point without and beyond the boundaries of said State, or taken and received
126 by complainant to be transported from any point without and beyond the boundaries of said State to any point within said State. And they expressly deny that there is any intent on the part of said attorney-general to do or cause or permit to be done any act or thing that shall in any manner tend to interfere with or to regulate the commerce among the several States.

Wherefore respondents aver that the complainant is not entitled to the relief sought and prayed for, or to any relief; and they therefore ask that complainant's bill be dismissed with costs.

(S'g'd) M. E. CUTTS,
Attorney-General of Iowa,
& W. H. SEEVERS,
Attorneys for Respondents.

STATE OF IOWA,
Mahaska County:

I, M. E. Cutts, having been duly sworn, say that I am one of the respondents in this cause, and that the matters and things, allega-
127 tions, averments, and denials contained in the foregoing answer are true, as I verily believe.

(S'g'd) M. E. CUTTS.

Subscribed in my presence and sworn to before me, by the above M. E. Cutts, this 31st day of December, 1874.

[SEAL.] JOHN A. HOFFMAN,
Notary Public.

128 *Exhibit A referred to in answer.*

OFFICE BUR. & MO. RIVER R. R. CO.,
Burlington, Iowa, Sept. 3d, 1856.

At a regular meeting of the board of directors of said company held this day, the following resolution was unanimously adopted:

Resolved, That the act of the gen'l assembly of the State of Iowa, approved July 14, 1856, entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856," be, and the same is hereby, accepted by this company, and all the provisions of the same are hereby assented to.

W. F. COOLBAUGH,
President.

Attest:
OLIVER COCK, *Sec't'y.*
With the seal of the company hereto affixed this 3d day of Sept., 1856

Filed Sept. 6, 1856.
[SEAL.] G. W. McCLEARY,
Sec'y of State.

129 STATE OF IOWA,
Office of Secretary State:

I, Josiah T. Young, secretary of state of the State Iowa, hereby certify that the foregoing is a true and correct copy from the records of this office, showing the acceptance by the Burlington and Missouri River Railroad Company of the terms and conditions of the land-grant to said company.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State.

Done at Des Moines this twelfth day of December, A. D. 1874.
[SEAL.] (S'g'd) JOSIAH T. YOUNG,
Secretary of State.

(Endorsed:) Chicago, Burlington & Quincy R. R. Co. vs. M. E. Cutts, atty. gen'l et al. Answer. Filed January 2, 1875. George B. Corkhill, clerk.

130 *Seperate answer of deft. Daniel Campbell.*

In circuit court of United States, district of Iowa.

THE CHICAGO, BURLINGTON AND QUINCY R. R. Co.
vs.
CUTTS, ATTORNEY-GENERAL OF STATE OF Iowa, et al., defts.

Now comes deft. Daniel Campbell, and for his seperate answer to petition of plff., or for answer to so much thereof as he is advised it is material for him to answer, and not waiving any objections to the several imperfections and insufficiencies of said petition, but insisting on same as if specially demur'ed to, answering, says:

1st. He denies that he has any suit now pending in the circuit court

of the United States for the district of Iowa, or in any other of the United States court', or in any other court other than as hereinafter set forth.

131 2nd. He says that heretofore, to wit, at and prior to the 22 day of Oct., 1874, he had brought, and that there was then pending in the circuit court of Henry County, Iowa, a suit wherein this deft. was plff. and said R. R. co. was deft.; that on said 22 day of Oct., 1874, this plaintiff, by leave of said circuit court of Henry County, dismissed said suit, as he had a right to do, said dismissal being without exception or objection on the part of defts. therein, (the plff. in this suit.) That afterwards, to wit, on the 24th day of October, 1874, this deft. again commenced suit against said railroad co., to wit, in the district court of Henry County, Iowa, based on and embracing the causes of action sit out and referred to in his first suit above referred to, by filing his petition in the office of the clerk of said district court, and that, with the exception of the two suits above named, he has had no suits on account of matter alleged in petition against the plff. herein. That afterwards, to wit, at the Nov. term, 1874, to wit, on the 30th day of Nov., 1874, the said railroad co. filed its answer to the petition of this deft. in said suit, to which

132 this deft. filed his replication, and he says that said suit is still pending in the said district court of Henry County, Iowa, and he says that he has no other suit pending in any court against the plaintiff herein.

3rd. And said deft., further answering, says, on information and belief, that the plaintiff in this cause, after the dismissal by this deft. of his suit in the circuit court of Henry County, Iowa, as above referred to, and after the commencement of his second suit, to wit, his said suit in the district court of said Henry County, this plff., the Chicago, Burlinglington and Quincy R. R. Co., of its own motion, as this deft. is informed and believes, caused to be filed in the circuit court of the United States for the district of Iowa a transcript of the petition and papers in said suit of this deft. so dismissed by this deft. as above stated. But he says that he was in no manner a party to said action or the filing of said papers, and that at and prior to the time thereof no suit was

133 pending in said circuit court; that this deft. is not nor has he any intention of prosecuting any suit in this honorable court.

4. He adopts all and singular the answer of defts. Cutts & others herein not inconsistent with the above answer. And having fully answered herein, he asks that he be discharged with his costs; and he ever prays.

H. &. R. AMBLER,
Attys. for Deft. Daniel Campbell.

STATE OF IOWA, *Scott County:*

I, R. Ambler, being duly sworn, on oath say that I am one of deft.'s, Campbell's, attys. in above suit; that the facts set forth in theforegoing answer are within my own personal knowledge, and that the several statements and allegations therein set forth are all and singular true, as I verily believe.

R. AMBLER.

Subscribed and sworn to before me by R. Ambler this 5th day of Jan'y, 1874. Witness my hand and notarial seal.

134 { C. WHITAKER, NOTARIAL SEAL, SCOTT COUNTY, IOWA. }

C. WHITAKER,
Notary Public, Scott County, Iowa.

(Endorsed:) Chicago, Burlington and Quincy R. R. Co. vs. Cutts, atty. gen. State, et al. Seperate answer of Daniel Campbell. H. and R. Ambler, for deft.

135 UNITED STATES OF AMERICA,
District of Iowa, ss:

In the circuit court of said district.

THE CHICAGO, BURLINGTON & QUINCY RAILroad Company, complainant,
vs.
M. E. CUTTS, ATTORNEY-GENERAL; WILLIAM Christy, treasurer of the State of Iowa, and Daniel Campbell.

Now comes the complainant, for replication to respondents' answers, and say' that the matters and things in complainant's bill of complaint are true in manner and form as therein set forth and contained, & that complainant will prove the same, without this, that anything in respondents' answer contained to contrary thereof is true, and complainant therefore denies the truth of said answers, and of the matters of fact & of law therein stated, averred, alleged, or contained so far as the same are inconsistent with the truth of the complainant's said bill.

(S'g'd) O. H. BROWNING,
D. RORER, *Sols. for C.*

136 STATE OF IOWA,
Lucus County:

I, James B. Custer, having been first duly sworn, say that I am county treasurer of Lucas County, Iowa, and have personal cognisance of the matters and things herein stated. That in the year A. D. 1871 the voters of Chariton Township, in said county of Lucas, voted a tax of four per centum upon the assessed value of the taxable property in said township to aid the "Burlington and Missouri Railroad Company" in the construction of its railroad in and through said township. That in the said year the board of supervisors of said county duly *leaving* said taxes, and nearly the whole thereof has been collected and paid over to said R. R. co. by the said county treasurer, pursuant to and in accordance with the statute of the State relating thereto.

That said taxes were voted, levied, collected, and paid over as aforesaid, at the instance and request of the said R. R. co., its officers and authorized agents, and amounted in the aggregate to not less than twenty-eight thousand two hundred and sixty-seven dollars; that said R.
137 R. co. has constructed said road from Chariton, a point on the Burlington and Missouri River Railroad, in Lucas County, Iowa, in a southwesterly direction to Leon, in Decatur County, in said State, and said road is the only one projected or constructed from any point in said Lucas County on said B. and M. River Railroad in a southwesterly direction.

That exhibits marked are true copies of amounts of receipts from the said county treasurer of Lucas County for the taxes so collected and paid to said R. R. co., as hereinbefore stated, as shown on ledger.

J. B. CUSTER.

Subscribed and sworn to by J. B. Custer, before me and in my presence, this 28th day of Dec., A. D. 1874.

{ COUNTY SEAL, LUCAS COUNTY, IOWA. }

ROBERT McCORMICK,
Auditor.

(Endorsed:) C., B. & Q. R. R. Co. vs. M. E. Cutts, atty. gen'l, et al. Affidavit of J. B. Caster.

138 STATE OF IOWA,
Decatur County:

I, Francis Varga, having been first duly sworn, say that I am the county treasurer of Decatur County; that in the year A. D. 1871 the voters of the townships of Center and Garden Grove, and of the incorporated town of Leon, in said county, voted a tax of five per centum upon the assessed value of the taxable property in each of said townships, and in said town, to aid in the construction of the railroad of the Burlington & Missouri Railroad Company in and through said town and townships; that said taxes were, by the proper authorities, duly levied, and by the county treasurer collected, as were other taxes, and the same, amounting to about twenty-seven thousand seven hundred thirty-eight dollars, has been paid to said railroad company; that the road constructed by said company commences at Chariton, in Lucas County, and terminates at Leon, in Decatur County, and is known
139 as the Chariton Branch of the Burlington and Missouri River Railroad; that the exhibits hereto attached, marked "Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17," are correct copies of receipts given for the moneys paid by the county treasurer to said railroad company as above stated.

(S'g'd) FRANCIS VARGA,
Treasurer Decatur Co., Iowa.

Subscribed and sworn to by Francis Varga, before me and in my presence, this 30th day of Dec., A. D. 1874.

[SEAL.] A. E. CHASE,
Clerk Dist. Court.

140 STATE OF IOWA,
Taylor County:

I, Alexander John, having been first duly sworn, say that I am the county treasurer of Taylor County, Iowa; that in the year A. D. 1871, the voters of the respective and several townships of Benton, Grant, Grove, & Marshal voted a tax of five per centum upon the assessed value of the taxable property of each of said townships to aid the Creston Branch of the Burlington and Missouri River Railroad Company to construct its railroad in and through each of said several townships, excepting through said Grant twp.; that, in the same year, the voters of the several and respective townships of Clayton, Platte, & Ross, in said county, voted a tax of three per centum upon the assessed value of the taxable property in each of said several townships for the purpose of aiding said R. R. co. to construct its railroad in and through each of said townships; that, in the same year, the voters of Jack-
141 son township voted a tax of two per centum upon the assessed value of the taxable property of said township for the purpose of aiding said R. R. co. to construct its said road.

That the board of supervisors of said county of Taylor duly levied the said taxes so voted upon the property in said respective townships

and the same, amounting in the aggregate to over forty-two thousand dollars, has been collected by the county treasurer of said county and paid over to the said railroad company for the purposes aforesaid.

That said taxes were voted, levied, collected, and paid over as hereinbefore stated, at the instance and request of the said company, as expressed by and through its officers and agent, and were voted, levied, collected, and paid over pursuant to and in accordance with the statutes of the State relating thereto; that said company was aided in the construction of its road in and through said townships by said taxes so collected and paid over.

142 That no other line of railroad except that of the said Creston Branch of the Burlington and Missouri River Railroad Company was projected, commenced, or constructed from a point on the Burlington and Missouri R. R., in Union County, in a southwesterly direction; and that the said railroad, so aided as aforesaid, is the same that is now operated from Creston, in Union County, to the town of Bedford, in Taylor County, and known as the Creston Branch of the Bur. & Mis. River Railroad, to the best of my knowledge, information, and belief.

Copies of the receipts given by the said R. R. co. for said taxes are hereto annexed as exhibits.

(S'g'd) ALEX. JOHN.

Subscribed & sworn to by Alexander John, before me and in my presence this 29th day of December, A. D. 1874.

[SEAL.] (S'g'd) E. G. MEDFORD,
Notary Public.

143 STATE OF IOWA,
Union County:

I, L. A. Helt, having been duly sworn, say that I am the treasurer of Union County, in the State of Iowa, and have personal cognizance of the matters herein stated; that in the year A. D. 1870 the electors of Douglas Township, in said county, voted a tax of three per centum upon the assessed value of the taxable property in said townships to aid the Creston Branch of the Burlington and Missouri River Railroad to construct its railroad in and through said townships; that in the same year the voters of Spalding Township voted a tax of two per centum upon the assessed value of the taxable property in said township to aid said company to construct its railroad.

That said taxes so voted in said townships were duly and legally levied by the supervisors of said county, and a large portion thereof,

144 amounting in the aggregate to not less than eight thousand dollars, were collected and paid over to the said railroad company for the purposes aforesaid, pursuant to and in accordance with the statutes of the State. I further state that said taxes were voted, levied, collected, and paid over as aforesaid to said company at the instance and request of said company, its officers and authorized agents, and was received by said company for the purpose of aiding in the construction of said road, and that said road was constructed by the aid of said taxes so voted, levied, and collected as aforesaid; that said road has since been constructed from Creston, on the Burlington and Missouri River Railroad, in said county of Union, in a southwesterly direction, through the said townships above named, to the town of Bedford, in Taylor County, in said State, and is the only railroad projected or constructed from said town of Creston in a southerly or southwesterly direction. The exhibits hereto attached, marked "No. 1," are correct copies of

145 the receipts given to the county treasurer for the taxes collected and paid to said railroad company as hereinbefore stated.

(S'g'd) L. A. HELT, *Treas.*

Subscribed and sworn to by L. A. Helt, before me and in my presence, this day of December, A. D. 1874. *Dec.* 28.

[SEAL.] H. A. BOLTEMAN,
Co. Auditor, Union Co., Iowa

The R. R. does not run through Spaulding township.

L. A. HELT.

146 STATE OF IOWA,
Henry County, ss:

Be it remembered that at a term of the circuit court within and for said county and State, begun and holden at the court-house in the city of Mount Pleasant, on the 3rd Monday, to wit, the 19 day of October, 1874—Hon. John B. Drayer, sole judge of the first judicial circuit of said State, presiding—on the 4th day of said term, it being the 22nd day of October, A. D. 1874, among other, the following proceedings were had and entered of record, to wit:

DANIEL CAMPBELL
vs.
THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO. } Law. 542.

Now comes the plaintiff, by Woolson and Babb, and H. R. Ambler, his attys., and the defendant, by Bowman & Barger, its attys., and this cause is dismissed at costs of plff., and on his motion.

STATE OF IOWA,
Henry County, ss:

147 I, J. N. Allen, clerk of the circuit court in and for said county and State, do hereby certify that the foregoing and above is a full, true, and complete copy of the order of dismissal in the above-entitled cause, as full and complete as the same appears of record in my office.

Given under my hand and seal of said court, at Mt. Pleasant, Iowa, this 4th day of January, A. D. 1875.

{ CIRCUIT COURT SEAL, IOWA, OF HENRY CO. } J. N. ALLEN,
Clerk of said Court.

(Endorsed:) Daniel Campbell vs. The C., B. and Q. R. R. Co. Transcript.

148 I, J. N. Allen, clerk of the district and circuit courts of Henry County, Iowa, do hereby certify that there was pending in the circuit court of Henry County, Iowa, a suit wherein Daniel Campbell was plff. and the Chicago, Burlington and Quincy Railroad was deft., being law No. 543 of said court, which said suit was dismissed by plff.'s attys. on the 22d day of Oct. 1874; that afterwards, on the 24th day of said month, a suit was commenced in the district court of said county, with same parties as plff. and defts., and that after the docketing of said second cause, being No. 2123 law of said district court, defts. procured

to be made and certified a transcript of papers and record *and* said dismissed cause.

{ SEAL ON THE DISTRICT COURT OF HENRY COUNTY, IOWA. } Witness my hand and official seal this 4th day of Jan'y, 1875.

J. N. ALLEN,
Clerk of said Court.

(Endorsed:)

149 And on the 18th day of May, the same being of the May term, 1875, of said court, there appears in the records of the proceedings thereof in said cause the following decree, to wit:

150 United States circuit court, district of Iowa, May term, 1875.
Tuesday, May 18, 1875.

CHICAGO, BURLINGTON AND QUINCY RAILROAD Company
vs.
M. E. CUTTS, ATTORNEY GENERAL OF IOWA, et. al.
} No. 544. Eq.

This day this cause came on to be heard upon the application of the said complainant for an injunction to enjoin and restrain the said defendant from instituting and prosecuting suits against the said complainant under and by virtue of an act of the general assembly of the said State of Iowa entitled "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of the State," approved March 23, 1874, said injunction being asked for on the ground that said act is in conflict with the
151 Constitution of the United States, in that it impairs the obligation of a contract and is also a regulation of interstate commerce; that it is also repugnant to the constitution of the State, for the reason that it does not affect all railroads alike, and is therefore not of uniform operation; and for the further reason that it conflicts with section one of the bill of rights; and the court, having now duly considered said application of said complainant for an injunction, is of opinion that if it be conceeded that the said act of the general assembly of the State of Iowa is, among other things, a regulation of interstate commerce, and to that extent in conflict with the Constitution of the United States, yet, inasmuch as the said defendant has in his answer to the bill of said complainant expressly disclaimed any and all intention of enforcing or attempting to enforce the said act in respect to interstate commerce, the injunction is, on this ground, for this reason denied.

And the court being of opinion that said complainant is not, upon any of the other grounds stated in said bill of complaint, entitled
152 to an injunction against the said defendant, the said motion for an injunction, upon every ground stated in said bill, is wholly and in toto denied.

And now this cause coming on to be heard upon the bill of said complainant and the exhibits filed therewith, the answer of the said defendant and the exhibits filed therewith, the replication of said complainant to said answer, and the affidavits of J. B. Custer, Francis Varga, Alex. John, and L. A. Hell, which said affidavits are, by the consent of said parties, accepted and treated by the court as depositions, and the court, being now sufficiently advised of and concerning the premises, it is now ordered and decreed by the court that the said bill, so far as it is founded

upon and relates to the said interference of the said act of the general assembly of the said State of Iowa with interstate commerce, be, and the same is hereby, dismissed, but without prejudice to said complainant or to the right of said complainant at any time hereafter, if it shall
153 become necessary to do so, to renew the application for an injunction on that ground.

And it is further ordered and decreed by the court that the said bill, on all the other grounds of complaint therein stated, be dismissed at the costs of the said complainant, and that the said parties go hence without day, &c.

And thereupon the said complainant, by its counsel, prayed an appeal and tendered a bond in the penal sum of one thousand dollars; which is approved and the appeal allowed.

(Signed) SAM. F. MILLER, *Judge.*

154 And after the trial of said cause, the court, having fully considered the matters, filed an opinion therein, of which the following is a true copy:

155 United States circuit court, district of Iowa.

THE C., B. & Q. R. R. Co.
vs.
THE ATTORNEY-GEN. OF IOWA ET AL. } Bill for an injunction.

On the 23d day of March, 1874, the legislature of the State of Iowa passed an act entitled "An act to establish reasonable maximum rates of charges for the transportation of freights and passengers on the different railroads of this State." (Acts of 1874, p. 61.)

This act classifies all of the railroads within the State according to their gross annual earnings per mile, and provides in substance that railroads earning $4,000 per mile and over (class A) shall not charge more than 90 per cent. of the fixed rate; that roads earning $3,000 per mile (class B) shall not charge over 5 per cent. above the fixed rate; and roads earning $2,000 per mile (class C) shall not charge over 20 per cent. in addition to the fixed rate; and that they shall not charge respectively for passengers more than class A, three cents; class B, three and one-half cents; class C, four cents per mile for passengers.

The present suit is brought by the Chicago, Burlington and Quincy Railroad Company of Illinois, as the lessee in perpetuity, under legislative authority, of the Burlington and Missouri River Railroad Company of Iowa, to enjoin suits by the attorney-general of the State for the enforcement of the above-mentioned railway-tariff act of March 23, 1874. The bill rests upon the ground that the act last named is in conflict with the Constitution of the United States, in that it impairs the obligation of a contract, and is also a regulation of interstate commerce; that it is also repugnant to the constitution of the State, for the reason that it does not affect all railroads alike, and is therefore not of uniform operation; and for the further reason that it conflicts with section one of the bill of rights.

The answer admits most of the allegations of the bill, but denies that the B. & M. R. R. Co., either by the charter or the laws of Iowa, had the exclusive right and power to fix its rates of fare, and denies that any attempt is to be made to enforce the law so far as regards interstate commerce.

It is averred in the answer that if the B. & M. R. R. Co. ever did have

such exclusive right it yielded such right by its acceptance of the land-grant in A. D. 1856, under the conditions stated in the act granting said lands; that since the original charter was granted, and after the adoption of the new constitution of Iowa, in A. D. 1857, said charter has been amended in many material respects, and that by the acceptance of such amendments the charter became subject to amendment or repeal by the general assembly, under the provisions of said constitution conferring that power and right upon the general assembly; and *and* that it especially applies to the Red Oak branch, which was constructed by virtue of an amendment to the charter made in A. D. 1869.

156 That as to the other branch roads, they were constructed by the aid of taxes levied and collected in various townships under the act of 1870, which provided that all roads constructed by such aid "shall be subject to the control of the general assembly in regard to management of the same and the charges for transportation of freight and passengers."

On the bill, answer, and certain exhibits and affidavits, the complainant moves for the allowance of a temporary injunction to restrain the enforcement of the act of March 23, 1874.

For the complainant, O. H. Browning, D. Rorer, and James Grant; M. E. Cutts, attorney-general of Iowa, and W. H. Seevers for the respondents.

DILLON, *Circuit Judge:*

Whatever rights the complainant corporation has are derived from the Burlington & Missouri River Railroad Company. It will be conceded for the purposes of the present application that the complainant possesses all the franchises, rights, and powers of the Burlington company, and is entitled to the relief here sought if the last-named company would have been entitled thereto if it were itself using and operating its road. An inquiry into the rights of the Burlington company, as respects compensation for services rendered by it, becomes necessary. This company was incorporated in 1852. The constitution of the State then in force provided that "corporations, except for political or municipal purposes, shall not be created by special laws, but the general assembly shall provide by general laws for the organization of all other corporations."

Under this provision of the constitution the legistature, in 1851, passed a general act for the creation of corporations for pecuniary profit, including railway corporation'. No express power to alter or annul the articles of association of companies organized under the act was reserved. (Code, 1851, art. 43, pp. 108 and 109.)

It was under this general incorporation act that the Burlington Company was organized in 1852.

By this it was provided (Code, 1851, sec. 673) that "any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of canals, railways, bridges, or other works of internal improvements; but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided."

The next section (674) enumerates the powers of corporations organized under this act, as follows:

1. "To have perpetual succession;
2. "To sue and be sued by its corporate name;
3. "To have a common seal which it may alter at pleasure;
4. "To render the interests of the stockholders transferable;

5. "To exempt the private property of its members from liability for corporate debts except as herein otherwise declared;

6. "To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy;

7. "To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs, in accordance with law, and not incompatible with an honest purpose."

This, then, is the extent of the corporate powers and franchises of the company; and they are but little greater than those which the law "tacitly, and without any express provision, considers inseparable from every corporation" created for a like purpose. (Angell & Ames on Corp., sec. 110; 2 Kent Com., 224.)

The complainant seeks an injunction in this case, not on the ground that the maximum rates of charges allowed by the act of 1874 are unreasonable, but on the ground, distinctly asserted in the argument, that the company has the exclusive power to fix the measure of its own compensation, and consequently that such an enactment as that of 1874 is a violation of its chartered rights.

157 In considering this claim of the company, it cannot fail to arrest attention that the statute nowhere in terms confers upon railway corporations organized under it the power to fix or regulate their charges. We have, then, to deal with a case where the legislature has not expressly delegated to the company the power to fix its own tolls or compensation.

When we consider the rule of construction, as it is definitely settled in Great Britain and by the courts of this country, that any ambiguity or fair doubt in the charters of corporations operate in favor of the public, and that a corporate body can claim nothing not clearly granted, it is quite plain that the general power "to make contracts the same as individuals" cannot be held to amount to a contract between the State and the company that the latter should exclusively and permanently prescribe and regulate its own charges. The surrender of legislative power beyond recall in so important a matter cannot, in my judgment, be implied from any such general language.

Undoubtedly the railroad company may demand compensation for its services. It cannot be imagined that the legislature supposed the capital necessary to construct and operate railroads would be invested therein except for the hope of profit to be thereby realized; and there is no source of profits to a railway company except its earnings for the transportation of persons and property.

I have no difficulty, therefore, in holding that the legislature, either by the express power "to make contracts," or, what seems the more satisfactory ground, by just and necessary implication, did authorize railway corporations to demand and receive compensation for their services; but this is far short of conferring upon them an exclusive power in this respect, and one beyond future legislative control.

In all civilized countries the duty of providing and preserving safe and convenient highways to facilitate trade and communication between different parts of the State or community is considered a governmental duty. This may be done by the government directly or through the agency of corporations created for that purpose. The right of public supervision and control over highways results from the power and duty of providing and preserving them. As to ordinary highways these propositions are unquestioned. But it is denied that they apply to railways built by private capital and owned by private corporations created for the purpose of building them. Whoever studies the nature and

purposes of railways constructed under the authority of the State by means of private capital will see that such railways possess a twofold character. Such a railway is in part public and in part private. Because of its public character, relations, and uses, the judicial tribunals of this country, State and national, have at length settled the law to be that the State, to secure their construction, may exert in favor of the corporation authorized by it to build the road both its power of eminent domain and of taxation. This the State cannot do in respect of occupations or purposes private in their nature. A way thus authorized and established is intended for the public use and benefit, although the capital is furnished by the corporators or shareholders and the tolls belong to them. In its public character a railroad is an improved
158 highway or means of more rapid and commodious communication, and its public character is not divested by the fact that its ownership is private. These general views have been asserted by many State courts, but in this court it is sufficient to refer to the judgments of the Supreme Court of the United States in the cases of Olcott v. The Supervisors, 16 Wall., 678; Railroad Co. v. County of Otoe, 16 Wall., 673, and the very recent cases known as the Topeka and Iola tax cases, the opinions in which were given by the presiding justice of this court.

In its relations to its stockholders a railroad, or the property in the road and its income, is private property, and, subject to the lawful or reserved rights of the public, is invested with the sanctity of other private property. The distinction here indicated marks with general accuracy the extent of legislative control, except where this has been surrendered or abridged by a valid legislative contract. Over the railroad as a highway, and in all its public relations, the State, by virtue of its general legislative power, has supervision and control; but over the rights of the shareholders, so far as these are private property, the State has the same power and no greater than over other private property.

The power which the State may legitimately exercise over railways within it is subject to such further restrictions as it may have consented to by express grants in charters in respect of which no power of repeal or alterations is reserved, and by the commerce clause of the Federal Constitution, which withdraws interstate commerce from State control and confines the State to the regulation of its internal traffic. As our railroad system is made up of links supplied under the authority of the several States, it may admit of doubt, in our present knowledge, whether a power in a State thus limited can be beneficially exercised; but this is a legislative problem, and not a judicial question.

Without further enlarging upon the public nature and uses of railways, or undertaking to review the authorities cited, or examine the positions assumed by counsel, which would necessarily lead through a broad field of discussion, I content myself, on this branch of the subject, with stating as my conclusion that the legislature has not expressly conferred upon railway corporations in this State the exclusive power to fix their own charges; that such a power cannot be deduced by implication from the constituent act of the corporations, and that whatever powers are conferred in this respect are subject to an implied condition that they shall not be oppressively or unreasonably exercised, and also subject to the future exercise of the police regulations of the State or any other power possessed by the State, properly legislative in its nature, which includes the power to regulate, consistently with the charter, all of the franchises granted, and to prescribe and limit the amount of toll or charges which it shall be lawful to take.

This view, if sound, is decisive of the case against the railroad com-

pany. But if we should concede it to be erroneous, and that the company originally possessed chartered rights which the act of 1874 would violate, still it has surrendered any such right by any such acceptance of the act of July 14, 1856. On the 15th day of May of that year, Congress made a grant of lands to the State of Iowa "for the purpose of aiding in the construction of a railroad from Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River." The State could dispose of the lands for the sole purpose of building the line of railway, but it had the absolute power to select the company which should receive the *the* benefit of the grant. The legislature accepted the trust by the act of July 14, 1856, and by that act gave the benefit of the grant to the Burlington company upon condition that it should assent to the provisions of that act, which it did. Among the provisions of the act thus assented to by the company was the following:

159 "That the company accepting the provision of the act shall at all times be subject to such rules and regulations as may from time to time be enacted and provided by the general assembly of Iowa, not inconsistent with the provisions of this act and the act of Congress making the grant." (Rev. 1860, sec. 1311.)

The State of Iowa sustained towards these lands the relation of trustee of the General Government, and in that capacity could not divert or change the trust, but it also sustained toward any company on which it should confer the benefits of the grant the relation of a sovereign, and as such was capable of enacting any valid law whatever not in conflict with the act of Congress making the grant. The State had the power, therefore, to say to the donee of its bounty, we will give you the benefit of this grant of lands provided you will agree to be at all times subject to such rules and regulations as the general assembly may enact. The company occupied the grant, and thereby agreed to be subject to this condition. The only question, then, is as to the extent of the power recognized or given by the words "rules and regulations." The interpretation of these words must depend upon their occasion and purpose.

The occasion was an important one, both for the company and the State. The company was made the beneficiary of a large and valuable grant of lands. The State was endeavoring to secure for the benefit of the public the building of an important highway or line of communication from the Mississippi to the Missouri River.

Doubts as to the extent of the power of the State over the corporation, under the then existing legislation, suggested the provision in question, and it was undoubtedly the design of the legislature to secure a substantial right to the State, or a recognition by the company of such a right in the State. It is to be regretted that words were not used which would admit of no dispute, but as it is we must interpret those employed so as to effectuate the intention of the parties. Some aid to interpretation is afforded by the decisions of the Supreme Court of the United States in respect of the word "regulate" as it occurs in the Federal Constitution. These are referred to in the recent case of Hamilton vs. Dillin.

In this case it was held, under the act of July 13, 1861, that power to authorize commercial intercourse during the rebellion, "to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury," authorized the Secretary to impose as a condition of cotton-permits a tax of four cents a pound on cotton purchased

The following observations of Mr. Justice Bradley in the case last cited are pertinent to the case in hand. The learned judge says:

"It is contended that the imposition of the bonus of four cents per pound was not a 'rule' or a 'regulation,' within the fair meaning of the act; and it is conceded that in many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form, and time and circumstances, and not to substance. But it also must be conceded that in other cases the power is much more extensive and substantial. Thus, in the Constitution, the several powers 'to regulate commerce,' 'to establish a uniform rule of naturalization,' 'to make all needful rules and regulations respecting the territory or other property belonging to the United States,' are understood to give plenary control over those subjects. The power to regulate commerce has been held to include the power to suspend it, (1 Kent, 432;) and the power to make rules and regulations respecting the territory of the United States has been held to include the power to legislate for and govern such territory and establish governments therein. (4 Wheat., 422; Story on Con., § 1328.) The extensive effect given to these clauses is undoubtedly largely due to the character of the instrument and that of the donee of the powers, to wit, the legislature of the United States, to whom the grant of a power means the grant of a branch of sovereignty. It shows, however, that the rule of construction depends, at least in some sort, upon the nature of the subject-matter. In the *b*ase before us, the power of the Government to open and regulate trade with the enemy was intended to be conferred upon the President and the Secretary of the Treasury. The power of regulation in such a case is to be taken in its broadest sense, and, in our judgment, included the power to impose such conditions as the President and Secretary should see fit."

160 So, in the case before us, the legislature of the State is the donee or possessor of the power to make the rules and regulations in question, and the power is to be construed accordingly, and not in a narrow and technical sense. Any construction that deprives words of a substantial purpose or meaning would plainly thwart the purpose intended to be effected. The words, when carefully considered, satisfactorily evince a purpose of subjecting the companies to the control of the legislature. The language is, that the company accepting the grant shall at all times be subject to such rules and regulations as may from time to time (that is, as occasion arises) be enacted and provided by the general assemby of Iowa, and the only limitation named is that they shall not be inconsistent with the act of July 14, 1856, or the land-grant act of Congress.

Such rules and regulations are necessarily laws. Referring to this subject, counsel say that these words "can justly be construed only to refer to what is called the public and general management of the road as a highway, and not to change the vital, life-giving principle of the charter to the corporation, to regulate its own tariffs." But the power to regulate the public and general management of the road as a highway existed before, and the interpretation suggested is open to the objection of making an important provision, to which the company was expressly required solemnly to assent, useless and unavailing. The legislature, by this provision, meant, in my judgment, to put at rest any question that might then exist as to the subordination of the corporations accepting the grant to the legislative power of the State, so far as, consistently with the preservation of their franchises, the public good might from time to time require.

The act of 1874 is not void for want of uniformity, or because it does not prescribe a uniform rate for all railroads in the State.

There may be good reasons, connected with cost of construction and expense of operating and the amount of earnings, why railroads of one class should be allowed to charge more than roads of another class. The law is uniform in its operation upon all roads in each class; and similar acts, as, for example, dividing cities into classes, with different powers, are not uncommon in our legislation, and their validity has been sustained by the courts. The cases cited on the brief of the attorney-general fully establish this proposition.

I need not discuss the objection made by the bill to the act of 1874, as interfering with interstate commerce, since the answer expressly disclaims any intention to enforce or attempt to enforce the act in this respect.

Injunction denied.

161 And on the 18th day of May, 1875, there was filed in said clerk's office, in said cause, an affidavit as to the value of the matter in controversy; which said affidavit is in the words and figures following, to wit:

162 U. S. C. C., dis. Iowa.

THE C., B. & Q. R. R. COMPANY *vs.* THE ATTORNEY-GENERAL & OTHERS.

James Grant, being duly sworn, declares on oath that he is of counsel for the plaintiffs, and he knows that the matter in controversy in this cause amounts to the sum of five thousand dollars & upwards.

(Signed) JAMES GRANT.

Subscribed & sworn to before me, by James Grant, May 18, '75.

GEORGE B. CORKHILL, *Clerk.*

(Endorsed:) C., B. & Q. vs. Cutts. Affdt. of Jas. Grant as to value of matter in controversy. Filed May 18, 1875. Geo. B. Corkhill, cl'rk.

163 And afterwards, to wit, on the 12th day of May, A. D. 1875, said complainant filed its appeal-bond in said clerk's office; which said appeal-bond is in the words and figures following, to wit:

164 *Appeal-bond.*

In the circuit court of the United States, dist. of Iowa, May term, 1875.

CHICAGO, BURLINGTON & QUINCY R. R. CO. *vs.* M. E. CUTTS, ATTY. GEN'L, & WM. CHRISTY, treasurer.

Know all men by these presents that we, the Chicago, Burlington & Quincy Railroad Co., as *as* principal, and , as security, are held and firmly bound unto M. E. Cutts, attorney-general, and William Christy, treasurer, in the penal sum of one thousand dollars, for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and assigns firmly by these presents, dated this 12th day of May, A. D. 1875.

The condition of this bond is such that whereas the said Chicago, Burlington & Quincy Railroad Company has appealed from the judgment or order of the circuit court of the United States for district of Iowa, made at the May term of said court, A. D. 1875, in a certain cause in equity wherein the Chicago, Burlington & Quincy R. R. Co. is plaintiff and said Cutts & Christy are defendants, to the Supreme Court of the United States:

Now, if the said Chicago, Burlington & Quincy R. R. Co. shall pay all costs and damages that shall be adjudged against it, and if it satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court may render or order to be rendered by the circuit court, not exceeding in amount or value the original judgment or order, and all costs and charges that may be awarded thereon by said Supreme Court, then this obligation to be void; otherwise to be and remain in full force.

(Sgd.) CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Principal,

By D. RORER,
Its Attorney, & of Counsel in this Case.
JAMES GRANT, *Security.*
Security.
Security.

Approved this 12 day of May, A. D. 1875.

JOHN F. DILLON,
Circuit Judge.

(Endorsed:) Filed May 12, 1875. George B. Corkhill, clerk.

165 In the circuit court of the United States for the district of Iowa.

I, George B. Corkhill, clerk of the said court for said district, do hereby certify that the foregoing transcript contains full, true, and complete copies of the pleadings, evidence, final decree, and appeal-bond in a certain cause adjudicated in said court wherein the Chicago, Burlington & Quincy Railroad Co. was plaintiff and M. E. Cutts, attorney-general, et al., were defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, this 22d day of July, A. D. 1875.

[SEAL.]

GEORGE B. CORKHILL,
Clerk U. S. C. C., District of Iowa.

(Indorsement on cover:) No. 552. The Chicago, Burlington and Quincy Railroad Company, appellant, vs. M. E. Cutts, attorney-general, & William Christy, treasurer of the State of Iowa, & Daniel Campbell. Iowa C. C. U. S. Filed August 2d, 1875.

IN THE

SUPREME COURT

Of the United States,

OCTOBER TERM, A. D. 1875.

NO. 552.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellants,

—vs.—

M. E. CUTTS, Attorney General, and WILLIAM CHRISTY, Treasurer of the State of Iowa, and DANIEL CAMPBELL, Appellees.

Appeal from the Circuit Court of the United States for the District of Iowa.

Statement of Case and Brief for Appellants.

O. H. BROWNING, for Appellants.

CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.

1875.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1875.

NO. 552.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD CO., APPELLANTS,

VS.

M. E. CUTTS, ATTORNEY GENERAL, AND WILLIAM CHRISTY,
TREASURER OF THE STATE OF IOWA, AND
DANIEL CAMPBELL, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IOWA.

STATEMENT OF CASE AND BRIEF FOR APPELLANTS.

O. H. BROWNING, FOR APPELLANTS.

CHICAGO:
BEACH, BARNARD & CO., PRINTERS, 98 RANDOLPH ST.
1875.

STATEMENT OF THE CASE.

This bill was filed for the purpose of obtaining an injunction against the Attorney-General of the State of Iowa, to enjoin and restrain him from prosecuting suits against the complainant company, or its officers, agents or employees, under the provisions of an act passed by the legislature of Iowa, entitled "An Act to establish reasonable "maximum rates of charges for the transportation of freight "and passengers on the different railroads of this State," approved March 23, 1874; and to enjoin and restrain the Treasurer from paying money from the treasury of the State, as compensation to counsel to conduct, or assist in conducting prosecutions or actions against the complainant for alleged violations of the provisions of said law, and from paying any money from the treasury of the State for the incidental expenses of such prosecutions.

It is alleged in the bill that the law, the title of which is given above, violates the constitution of the United States and of the State of Iowa; and this is the question presented by the record, and upon which the decision of this court is asked.

The complainant corporation was created by the State of Illinois, and is the owner of a valuable road in that State, and is the lessee of the Burlington and Missouri River Railroad in the State of Iowa; the two roads being connected by a bridge which crosses the Mississippi River at Burlington, thus making a continuous and uninterrupted line of railroad from Chicago, Illinois, to Plattsmouth on the Missouri River, Iowa.

The main branch of the Burlington and Missouri River Railroad stretches across Iowa, from Burlington, on the Mississippi River, to Plattsmouth, on the Missouri River; and, connected with it, are four branch roads, viz: the Nebraska City Branch, extending from Red Oak to Hamburg, a distance of thirty-nine miles, which was built by the Burlington and Missouri River Railroad Company, under its charter; and the Creston Branch extending from Creston to Hopkins, forty-nine miles; the Branch from Chariton to Leon, thirty-seven miles; and the Villisca Branch, extending from Villisca to Clarinda, sixteen miles, all of which were built under separate charters, by different companies, but which came into the possession and control of the Burlington and Missouri River Railroad Company, and were leased, with its main branch, to the complainant company.

In constructing its road, the Burlington and Missouri River Railroad Company incurred a very large indebtedness, to secure the payment of which, it mortgaged its road, appurtenances, equipments and franchises, which mortgages are still outstanding. There were two of these mortgages, aggregating $5,468,050. The first one for $4,802,050, was made October 1, 1863, and the second, for $666,000, July 1, 1871.

On December 31st, 1872, the Burlington and Missouri River Railroad Company leased its road and the branch roads above mentioned, with all their fixtures, appurtenances and equipments of every kind, and all their franchises and privileges, to the complainant company, in perpetuity, and delivered the possession thereof to the complainant company, which has continued in the possession and use of said roads, franchises and privileges ever since.

In and by the indenture of lease, the complainant company covenanted to take immediate possession of the demised premises, and to keep the railroad and branches equipped, and maintain and operate them in such manner

as to furnish reasonable accommodations to the public, and to pay all taxes and assessments that might be lawfully levied, charged or assessed on the roads and property, or any part thereof; to assume all leases, contracts, bonds, and other obligations of whatever kind; to pay and discharge all debts and liabilities of every nature, both principal and interest; to make to the stockholders of the Burlington and Missouri River Railroad and branches, the same, and same amount of dividends per share, that it should make to its own stockholders, and to grant and secure to them the same benefits and emoluments, of every description, that its own stockholders might receive, have, or become entitled to. All these covenants have been faithfully kept by the complainant company.

The indebtedness, over and above the expenses of keeping the roads in repair and operation, which the complainant company became liable to pay for the leased roads, amounted to the sum of $7,353,950; and the stock of said roads, upon which it obligated itself to pay dividends, amounts to the further sum of $6,532,552.76; and for the means of payment, it necessarily relies upon the earnings of the roads.

The complainant company claims, and charges in its bill, that under the provisions of the laws of Iowa, which existed, and were in force when the Burlington and Missouri River Railroad Company was organized, and when the money with which its road and branches were built and equipped, was borrowed, and the mortgages to secure the payment thereof were executed, the company had the right to fix, determine and establish the tariff of rates, for the transportation of freight and passengers over its road and branches, and that it has always heretofore exercised that right without question of its power and authority to do so; that this right, power and privilege were, by the lease aforesaid, assigned, set over and transferred to the complainant company; and that it has, ever since the lease,

exercised the power without question of its right to do so; that in the exercise of such power, it has fixed and adjusted the tariff of charges for the transportation of persons and property over the road and branches, with a view to furnishing to the country the greatest facilities of transportation, and at the lowest rates, compatible with the duty of the complainant company to keep the roads in good condition and repair, and provided with the necessary depots, freight houses, machine shops, engines, cars, &c., to meet the demands of business, and to provide the means of defraying the expenses of operating the roads, paying the interest upon the indebtedness, and earning reasonable dividends for the stockholders; and that the earnings of the roads, under the operations of the tariff so established, have been barely adequate, under careful and economical management, to such purposes; and that these ends cannot be attained if the complainant company shall be deprived of its just and lawful right to fix its tariff of charges, and so to adjust it as to meet the varying condition and circumstances of the country, and the fluctuations and necessities of trade and commerce.

It is further charged in the bill that the persons who loaned the money with which the road and branches were built and equipped, and to secure the repayment of which the bonds and mortgages were executed, did so in reliance upon the earnings of the roads to refund and repay the money so loaned, and in the full confidence and belief that the right of the company to fix and control the tariff of charges for transportation would never be denied or interfered with; and that had it been known, believed or suspected that the General Assembly of Iowa, would attempt to deprive the company of such right, and itself claim and exercise the power of controlling the company in this regard, and of changing and altering the rates of charges at pleasure, irrespective of the tariff established by the company, and of compelling the company, by pains

and penalties, to adopt and conform to such rates as might, from time to time, be prescribed by the legislature, money for the construction of the road and branches could not have been obtained, and they would not have been built.

After the roads had been built and equipped, and leased to the complainant company, and after the complainant had taken possession of them, and fixed its tariff of charges for transportation thereon, and when it was successfully operating the same to the great benefit and advantage of the country, and of all parties interested in the roads, on the 23d day of March, 1874, the legislature of Iowa paased the act complained of, entitled, "An act to estab- "lish reasonable maximum rates of charges for the trans- "portation of freight and passengers on the different roads "of this State," which took effect on the 4th of July, 1874, and to which the attention of the court will hereafter be particularly called.

It is charged in the bill that the tariff of rates established by this law is different from the rates fixed by the company; and that the complainant will, if compelled to conform to it, be thereby deprived of the ability to meet and pay the expenses of keeping the roads in repair and successful operation, and to pay the interest on the debt, and reasonable dividends to its stockholders.

The Chicago, Burlington and Quincy Railroad, from Chicago to Burlington, and the Burlington and Missouri River Railroad, from Burlington to Plattsmouth, constitute one continuous road from Chicago, on Lake Michigan, to Plattsmouth, on the Missouri River; and it is charged in the bill that something more than three-fourths of all that is carried over the Burlington and Missouri River Railroad and branches, consists of passengers, goods, wares, merchandise, lumber, &c., taken up outside of the State of Iowa, and carried, without breaking bulk, into the State; and of passengers, grain, cattle, hogs, sheep, &c., taken up within the State, and carried in the cars in which

originally shipped, outside of the State and into other States.

After the Burlington and Missouri River Railroad Company had built its road from Burlington to the Des Moines River, a distance of seventy-five miles, there remained to be constructed, to reach its terminus on the Missouri River, 204 miles of road through a country very sparsely populated, and with but little business for the employment and support of a railroad, and the company was unable to provide the means for the further prosecution of the work. In this condition of things, the complainant company came to its aid, and took up and converted into stock $2,400,000 of the stock bonds of the company, which was equivalent to a subscription of $10,000 per mile, on the part of the road which remained to be built; and by the credit thus given, the company was enabled to, and did, obtain money to complete and equip its road.

The entire proceeds of the bonds and stock of the company were, in good faith, expended in the construction and equipment of its road and branches. No fictitious stock has ever been issued, nor has any portion of the stock ever been donated or given away; and yet so little business was supplied by the country along the line of the road that the company was never able to make a dividend to its stockholders till 1871, and then only a semi-annual dividend of 4 per cent.; so that down to that time the road was actually maintained and operated, for the benefit of the public, at the cost and expense of the stockholders.

The complainant company insists that the act above referred to, passed by the legislature of Iowa, impairs the obligation of the contract entered into between said State and the Burlington and Missouri River Railroad Company; the contract between the last named company and its stock and bond holders; and the contract between the Burlington and Missouri River Railroad Company and the complaining company; and that it is,

therefore, a violation of that provision of the constitution of the United States which denies to a State the power to pass any law impairing the obligation of a contract ; and that it is also a violation of that provision of the constitution of the United States which gives to Congress the power to regulate commerce among the several States.

The bill also charges that by the said act, and the pretended classification of railroads under it, the complainant company is required to transport passengers and property for less compensation than other railroad companies in the State are allowed to charge and receive for transporting persons and property, for equal distances, although the labor, cost and expense of transportation over the road of complainant are full as much per mile as the labor, cost and expense of like transportation over the roads which are allowed greater compensation therefor, and that it is, therefore, in conflict with, and a violation of the 6th section of Article 1, of the constitution of Iowa, which provides that " all laws of a general nature shall have a uni- " form operation, and that the General Assembly shall not " grant to any citizen or class of citizens privileges or im- " munities which, upon the same terms, shall not equally " belong to all citizens."

The 8th section of the act referred to appropriates money out of the State treasury to compensate counsel who may be employed to prosecute suits against complainant company, for a violation of the law.

The complainant company is a tax-payer in the State of Iowa, and objects to such a use of the public money, a part of which it is itself obliged to contribute, as contrary to the fundamental principles of right and justice, and a violation of the constitution of the United States, and of the State of Iowa.

To the foregoing bill an answer was filed by the Attorney General of Iowa, before the hearing of the motion for injunction.

The answer admits that the complainant company is a corporation organized, existing and doing business in Illinois, by virtue of the laws of Illinois, and that the Burlington and Missouri River Railroad Company was a corporation organized under the laws of Iowa, and that by its charter it was authorized to construct and use a railroad from Burlington to the most eligible point on the Missouri River, and that the road was constructed and put in operation as stated in the bill, including the branch from Red Oak to Hamburg. That the Creston branch of the Burlington and Missouri River Railroad Company was duly incorporated, and its road built, as stated in the bill.

That the Burlington and Missouri River Railroad Company was chartered, and its road built, as stated in the bill.

That the Villisca Branch from Villisca to Clarinda was constructed by the Brownsville and Nodaway Valley Railroad Company, as stated in the bill. But whether the Burlington and Missouri River Railroad Company assumed the possession and control of said branch roads, as charged in the bill, is neither admitted nor denied.

The answer sets up that the branch roads from Chariton to Leon, from Creston to Hopkins, and from Villisca to Clarinda, were built by the aid of taxes voted by, assessed upon, and collected from the people of the townships along the lines of said branch roads; and that by the laws of Iowa it is expressly provided that all railroads constructed by or with the aid of any taxes levied and collected under the provisions of said laws, shall be subject to the control of the General Assembly, in regard to the management of the same, and the charges for the transportation of freight and passengers thereon.

Has no knowledge of the amount of shares of stock and bonds issued and sold by the Burlington and Missouri River Railroad Company, and can neither admit nor deny.

Admits the making of the lease, as stated in the bill, but denies that the Burlington and Missouri River Railroad Company had authority to lease and transfer the branch roads to the Chicago, Burlington and Quincy Railroad Company.

Admits that the Burlington and Missouri River Railroad Company sold and conveyed to the C., B. & Q. R. R. Co., all the lands, real and personal estate, contracts, choses in action, &c., owned by it, in manner and form as charged in the bill; but states that the larger parts of the lands so sold and conveyed, had been granted by the general government to the State of Iowa, to aid in the construction of a railroad from Burlington to the Missouri River; and that the State of Iowa, by an act of the legislature, approved July 14, 1856, granted said lands to the Burlington and Missouri River Railroad Company, under certain conditions and restrictions, one of which was, that said railroad company should at all times be subject to such rules and regulations as might, from time to time, be enacted and provided for by the General Assembly of Iowa, not inconsistent with the provisions of said act and the act of Congress making the grant; and that the company accepted the grant with the conditions; and that by virtue of this contract between the State and the company, the General Assembly had full and complete power and authority to pass the act prescribing reasonable maximum rates of charges for transportation of freights and passengers over said railroad.

Admits the passing of the act to establish reasonable maximum rates, and avers that the rates so fixed will enable the company to derive therefrom sufficient money to defray all operating expenses, including all taxes

assessed, pay all the interest upon its indebtedness, and make reasonable dividends to its stockholders.

Admits that the railroads of Iowa were classified under the law referred to; that the road of the complainant was placed in class A, and that persons, companies and corporations, operating roads included in class A, are prohibited from charging or receiving as large compensation, for transporting freight and passengers, as is allowed to be charged for transporting freights and passengers, like distances, upon roads included in classes B and C.

The answer states that on or about the 23d day of June, 1869, the Burlington and Missouri River Railroad Company amended its original charter, and that under and by virtue of said amendment, it built its branch road from Red Oak to Hamburg, and increased its capital stock from $3,000,000 to $12,000,000; and that between the time of the adoption of the original charter and the making of the amendment, a new constitution was adopted by the people of Iowa, which specially reserved to the General Assembly the power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of the General Assembly; and that the act referred to, to fix reasonable maximum rates, was passed by a two-thirds vote of each branch of the General Assembly. The answer especially claims that the General Assembly had the right, under the new constitution, to regulate the rates of fare upon such portions of the road and branches as were constructed after the amendment of the company's charter.

The answer further sets up that on the 12th day of March, 1864, the General Assembly passed an act, making it lawful for railroad companies, with the assent of the stockholders, to issue preferred stock in the payment of debts, and that afterwards, on the 28th day of April, 1864, the Burlington and Missouri River Railroad Company

incorporated into its charter an amendment, to the effect that said company should have power to issue preferred stock; that on the 2d day of April, 1866, the General Assembly passed an act, providing that any railroad company in the State, with the assent of two-thirds of all the stockholders, should have power to make and issue preferred stock, in payment of debts, and that, afterwards, the said railroad company did issue preferred stock; by reason whereof, the charter of the company became liable to amendment or repeal by the General Assembly.

The answer denies that the Burlington and Missouri River Railroad Company had any right or power to sell, assign, transfer, or in any manner part with its rights and franchises; and that therefore the complainant company acquired no title or interest in and to said rights, privileges and franchises, by virtue of the lease or contract set up in the bill, and that consequently the complainant company has no right to maintain this suit.

The answer admits that the Attorney General is about to commence suits against the complainant company, for violations of the act referred to, but denies that he has any purpose of commencing suits on account of charges in excess of the amounts specified in the act, for transporting persons and property taken up in the State and carried beyond its limits, or taken up outside of the State and carried to any point within it.

To this answer, the complainant filed a general replication.

The only testimony in the case consisted of four affidavits taken by defendant, and which complainant agreed to admit, with the force and effect of depositions.

The sole and only purpose of these affidavits was, to prove that three of the branch roads mentioned in the bill, viz., from Chariton to Leon; from Creston to Hopkins;

and from Villisca to Clarinda, were built by the aid of taxes, voted by, assessed upon, and collected from the people of the townships along the lines of said branch roads; a fact which is not contested.

On the bill, answer, replications and affidavits, the case was brought to a hearing, upon the motion for an injunction, before the Circuit Court of the United States for the District of Iowa.

On the hearing, the court rendered a decree denying the injunction, and dismissing the bill, at the costs of complainant. From which decree complainant appealed.

The errors complained of are:

1. The refusal of the court to grant the injunction.
2. The decree dismissing the bill.

BRIEF OF ARGUMENT.

I.

The charter of the Burlington and Missouri River Railroad Company constitutes such a contract between the company and the State of Iowa, as is entitled to the protection of the constitution of the United States, and the obligation of which cannot be impaired by any act passed by the General Assembly of the State of Iowa.

AUTHORITIES.

Miller v. *State of New York*, 15 Wall., 478.
Pacific R. R. Co. v. *Maguire*, 20 Wall., 42.
Railroad Company v. *Maryland*, 21 Wall., 456.

II.

Under its charter, and the constitution and laws of Iowa, which existed at the time of its organization, the Burlington and Missouri River Railroad Company had the right to fix the rates of compensation for the transportation of persons and property over its road; and this right is a material and valuable part of its contract with the State, which the State can neither take away nor impair.

AUTHORITIES.

Revision of the Laws of Iowa, 1860, p. 969.
Chap. 43 of the Iowa Code, 1851, §§ 673, 674, 675, 676, 677, 678, 680.
Pierce on Am. R. R. Law, 461.
Miller v. *The State*, 15 Wall., 488.
Dartmouth College v. *Woodward*, 4 Wheat., 518.
Railroad Co. v. *Maryland*, 21 Wall., 468.
Boyle v. *Phila. & Reading R. R. Co.*, 54 Penn., 312.
Penn'a R. R. Co. v. *Sly*, 65 Penn., 207.
Cooley on Const. Lim., 279, and cases there referred to.
The People v. *Marshall*, 1 Gilm., 684.
State Freight Tax, 15 Wall., 233.
Ang. & Am. on Corp., § 111.
The People v. *The Manhattan Co.*, 9 Wend., 393.
Ang. on Carriers, § 124.
The Citizens' Bank v. *Nantucket Steamboat Co.*, 2 Story C. C. R., 35.
Brown v. *State of Maryland*, 12 Wheat., 419.
License Cases, 5 How., 574.
Iowa Code, 1851, §§ 729, 734, 736, 738, 750.
O. & M. R. R. Co. v. *McClelland*, 25 Ill., 141.

III.

The right which the company had under its charter, and the laws which existed when it was organized, to receive compensation for services, and to fix the rates of such compensation, by making its own contracts therefor, has never been forfeited or surrendered, but is still an existing right.

AUTHORITIES.

11 Stat. at Large, 9.
Revision of Laws of Iowa, 1860, pp. 215–16, 999, 1000.
2 Pars. on Cont., 494, 499.
Parkhurst v. *Smith*, Willes, 332.
Session Acts of Iowa, 1862, 197.
Session Acts of Iowa, 1870, 106, 179.
Iowa Code, 1873, 239.
Session Laws of Iowa, 1868, 13, 66, 68, 167.
The People v. *Marshall*, 1 Gilm. 683.
Session Acts of Iowa, 1864, 44, §§ 1, 2.
Iowa Code, 1851, Chap. 43.
B. & M. R. R. R. Co. v. *White*, 5 Iowa, 411.
Mayor &c., v. *Second Av. R. R. Co.*, 32 N. Y., 261.
Mayor &c. v. *Third Av. R. R. Co.*, 33 N. Y. 42.

IV.

The act of the Iowa legislature, entitled "an act to "establish reasonable maximum rates of charges for the "transportation of freights and passengers on the different "railroads of this State," approved March 23, 1874, impairs the obligation of the charter contract; of the contract between the company and its stockholders, and bond-

holders and mortgagees; and the contract between the complainant company, and the B. & M. R. R. R. Co., and is therefore unconstitutional, and null and void.

AUTHORITIES.

Session Acts of Iowa, 1874, p. 61.
Stewart v. *Laird*, 1 Cranch, 299.
Martin v. *Hunter's Lessee*, 1 Wheat., 351.
Cohens v. *Virginia*, 6 Wheat., 418.
Bank of U. S. v. *Halstead*, 10 Wheat., 63.
Ogden v. *Saunders*, 12 Wheat., 290.
Surgett v. *Lapice*, 8 How., 68.
Gibbons v. *Ogden*, 9 Wheat., 1.
City of New York v. *Miln*, 11 Pet., 157–8.
Ohio Life and Trust Co. v. *Debolt*, 16 How., 432.
Havemeyer v. *Iowa County*, 3 Wall., 294.
Thomson v. *Lee County*, 3 Wall., 331.
Larned v. *Burlington*, 4 Wall., 275.
City of Kenosha v. *Lamson*, 9 Wall., 477.
Olcott v. *Supervisors*, 16 Wall., 678.
Supervisors of Carroll Co. v. *United States*, 18 Wall., 71.

V.

The act of the Iowa legislature, now in question, is in conflict with the 14th amendment to the constitution of the United States, which provides that "No State shall "make or enforce any law which shall abridge the privi- "leges or immunities of citizens of the United States; nor "shall any State deprive any person of life, liberty or "property, without due process of law, nor deny to any

" person within its jurisdiction the equal protection of the " law."

Bartemeyer v. *Iowa*, 18 Wall., 132.
Railroad Company v. *Maryland*, 21 Wall., 471.
License cases, 5 How., 576.
Brown v. *State of Maryland*, 12 Wheat., 419.
R. R. Commr's v. *P. & O. C. R. R. Co.*, 63 Mo., 276.
1 B. C., 138. 2 Kent Com., 320.
Wynehamer v. *The People*, 13 N. Y., 398, 433.
See, also, *Pumpelly* v. *Green Bay Co.*, 13 Wall., 177.

VI.

The law is in conflict with the provision of the constitution of the United States which gives to Congress the power to regulate commerce among the several States.

14 U. S. Stat. at Large, 66.

VII.

The act, so far as it prescribes the rates of compensation for the transportation of persons and property, is not a police regulation, and cannot be maintained under the police power of the State.

Authorities.

License cases, 5 How., 589.
4 Black. Com., 162.

2 Bouv. Law Dic., 348.
Railroad Co. v. *Fuller*, 17 Wall., 267.
State v. *Noyes*, 47 Me., 189.
Cooley's Const. Lim., 574, *et seq.*
Benson v. *The Mayor, &c.*, 10 Barb., 345.
P. W. & B. R. R. Co. v. *Bower*, Am. Law Reg., March No. 1874, p. 174.
T. W. & W. R. W. Co. v. *Jacksonville*, 67 Ills., 40.

VIII.

The act is in conflict with, and a violation of, Section VI, Art. I of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform "operation; the General Assembly shall not grant to any "citizen, or class of citizens, privileges or immunities, "which, upon the same terms, shall not equally belong to "all citizens."

AUTHORITY.

Sect. 6, Art. I, Constitution of Iowa.

O. H. BROWNING,
For Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHICAGO, BURLINGTON & QUINCY R. R. CO., Compl't,
vs.
M. E. CUTTS, ATTORNEY GENERAL, AND OTHERS, Defendants.

ARGUMENT

By DAVID RORER,
OF COUNSEL FOR COMPLAINANTS.

I.

By an unbroken chain of decisions from the Darthmouth College case to the present time, it is so well settled that the charter of a private corporation is a contract betwixt the corporators and the state, and that it may not be *impaired* under the constitution of the United States, that it were inexcusable in us to cite authorities thereto, before this learned tribunal.

II.

Such too is the law, whether the corporation be created by a special act of assembly, or be organized by voluntary association under a *general incorporation* law; and if the latter, then such *general* law enters into the charter. Hougland *vs.* The Cincinnati and Ft. Wayne R. R. Co. 18 Ind., 453, 454; Buffalo and New York R. R. Co *vs.* Brainard, 9 N. Y., (5 Seld.) 100, 110.

III.

The corporation of the Burlington and Missouri River Railroad Company was organized and incorporated January 15, 1852, under the general incorporation law, chapter 43 of the Code, as appears by the charter in exhibit to the bill. Nothing is *expressed* in said charter or in said law, as to the fixing of rates of compensation for services rendered by the company, in transportation of persons or property, but all the powers of natural persons were conferred by said general incorporation law. At the same date, and as a part of the same statute, there was a provision enacted, for licensing works of *Internal Improvement*—See Sec. 712, and succeeding sections, in chapter forty-five of said Code. In this chapter, the right of the public authorities to fix the rate of fares and transportation is expressly given, as to all such works as should be constructed under a license obtained under said chapter; also, the power to make the privilege given by license *exclusive*—that is *a monopoly*. Hence the provision in such cases for fixing the rates by the public authorities, for the reason that competition, when the grant was *exclusive*, would be prevented. Now, the providing in the same act, for those two distinct methods of procuring works of internal improvement, by one of which the privilege might be *exclusive*, whilst by the other it *could not*, and asserting the right of the public authorities to fix the rates of service in the one case, and saying nothing about it in the other, clearly indicate the *intention of the legislature* to have been, to leave that right in the corporations, to be organized under the general incorporation law, which was silent on the subject. Code of 1851, p. 108, and 114.

IV.

But aside from all such legislative evidences, the right of such corporation to compensation for services, and to fix the amount thereof, is *implied* in law, if there be no provision to the contrary in the law of its creation, or in some cotemporary law. Pennsylvania R. R. Co. *vs.* Sly, 65 Penn. St. R., 211; Boyle *vs.* The Philadelphia and Reading R. R. Co., 54 Penn. St. R., 310, 316, 318; The State *vs.* Chovin, 7 Iowa, 204; Crocker *vs.* The New London, Williamantic and Palmer R. R. Co., 24 Conn., 249; The State *vs.* Overton, 4 Zabr. (N. J.) 435; State Freight Cases, 15 Wal., 232–278; Railroad Co. *vs.* Davis, 2 Dev. & Batt., 468.

In the case of Boyle *vs.* The Philadelphia and Reading Railroad road Company, above cited the Supreme Court of Pennsylvania, Strong J., say: "No provision was made respecting rates and charges for their own service as carriers; but the very purpose of their incorporation was that they might carry." * * * "The right to charge is *implied* in the nature of the business, and I cannot conceive of conducting the business of transportation without the imposition of rates and charges." * * * * * "It would be easy to show more fully, were it necessary, that a grant of power to enter into the business of transportation of passengers and merchandise, carries with it the authority to *enter into contracts*, by which the business of common carriers is conducted, is too obvious to require argument to prove it" To the same purport, see also, Penn. R. R. Co. *vs.* Sly, referred to above.

It is objected that a corporation takes nothing by implication. But this rule exists only as to the purposes for which it is created—its corporate capacity. As that a corporation to construct and operate a *railroad* on the *land*, may not construct and operate *ships* upon the *sea*, or may not engage in banking, in trade, or in building a canal, and does not exist in regard to those necessary things which are the very life of it, in the business for which it is created.

For this right to bargain for and fix its own rates, however, the company need not rely alone on inferences. The first section of the general incorporation law under which this corporation was created, confers the same powers and rights on this legal person, as exist in regard to *natural persons*. Code of 1851, Chap. 43. This, of course, includes the right not only to exact pay for services rendered, but also to fix its own price. For any *abuse* of this power, by *extortion* or otherwise, the writ of *mandamas*, or of *quo warranto*, as the case may be, by the state, are the remedies and the safeguards of the public.

V.

Formerly corporations aggregate were created only by special acts of legislation. This lead to discrimination and partiality in granting to some, and refusing grants to others, and also in the *terms* of corporate grants. To prevent all this, in Iowa special acts of incorporation are prohibited by the constitution from being passed by the general assembly. Old Constitution, Sec. 2, Article 8. New Cons., Sec. 1, Article 8. This inhibition applies, we sup-

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V.

Formerly corporations aggregate were created only by special acts of legislation. This lead to discrimination and partiality in granting to some, and refusing grants to others, and also in the *terms* of corporate grants. To prevent all this, in Iowa special acts of incorporation are prohibited by the constitution from being passed by the general assembly. Old Constitution, Sec. 2, Article 8. New Cons., Sec. 1, Article 8. This inhibition applies, we sup-

pose, as well to a law regulating or *conferring* the attributes, powers and exemptions of the corporate body, as to an enactment creating that body as a corporation; Trask *vs.* McGuire, 18 Wal., 391; for without its *attributes* the *corporation* would at least be harmless. It follows, then, that neither the corporate *entity*, nor its *attributes* can be conferred or diminished by an act of assembly, other than the *general* incorporation law contemplated by the constitutional provisions above cited. If they may be so conferred, then notwithstanding all are created equal under the general law, yet discrimination may be inaugurated for *favor*, or for *prejudice*, for *influence*, or for *lack* of it, by passing other laws *purporting* to be *general*, yet *curtailing* the rights of some, and thereby relatively *enlarging* those of others, and thus effect the very thing intended by the constitution to be prevented. We need, therefore, no other authorities than the constitutional provisions above relied upon, to prove that corporate *powers* or *rights* cannot be *diminished*, *enlarged* or *conferred*, as to private corporations by laws other than such *general incorporation* law. It results therefore that subsequent laws taking away, or *partially* taking away the right of the company to fix its rates are unconstitutional. They are prohibited by policy of state, and for the benefit of the whole people, and the legislature cannot clothe itself with the prohibited power, by mere consent of or contract with one or more of such corporate bodies; powers which the constitution denies to the legislature, the railroad company cannot give. In Iowa the local constitution prohibits *imprisonment* for debt. Can the state pass a law to imprison any class of men for debt by virtue of their own mere consent? The trust of conferring citizenship of the United States by naturalization is conferred on courts of the state, as this trust was conferred on the legislature of Iowa. Can the state annex terms of villenage or obedience to state behest, to the conferring citizenship by naturalization? Can it say you are a citizen on condition that you will submit to such rules and regulations as the state may from time to time prescribe? or that the state may fix the price of your labors? The pretence would be futile and yet these and the case before us are parallel. Therefore, the stipulation in the land grant acceptance, to conform to rules and regulations, &c., cannot apply to a limitation of corporate powers already conferred to fix rates for itself by the company, but rather to matters of police required for public safety. As for instance, bell ringing and whistling at crossings; flaging crossings; fencing roads; providing spark arrestors for locomotives; manner of crossing highways; requiring

companies to *fix* and *set up their rates*, (obviously to prevent imposition of employees upon the public;) laws requiring certain officers of the company to reside in the state; laws regulating intersection and connection of railroads; laws making railroad companies liable for injuries inflicted on one or more of employees by the negligence of another employee; laws requiring fencing of roads and making cattle guards; the passage of all acts by the general assembly, on these subjects, followed close upon the acceptance of the land grant. None such were passed before. But it is said the power to pass these existed in the legislature independent of the land grant stipulation. To this we answer, that this stipulation was, as is often the case in legislation, a mere work of supererogation, but the legislature did not suppose it gave power to *regulate rates*. As an evidence of this, we may refer to the fact that no effort to *control* the *rates* of the company, or of any railroad company were ever made by the legislature until the passage of the act now involved, whilst in all the intervening time the *complainant* was by law required to fix and post up its rates and fares annually. This was a police regulation for the benefit of travelers and shippers, that they might not be imposed on by servants of these companies.

If the recent imposition is imposed by virtue of the consent contained in the land grant acceptance, why is it that other roads which got no grants are subjected to a like imposition? The obnoxious law is *general*. It applies to all railroads in the state. Laws of Iowa of 1862, p. 197; ib., pp. 183, 184, 197, 198, 199.

In re-granting the lands to the Rock Island and some other roads in 1868, the legislature added to the original terms of the acceptance, which were *then* as *ours* are *now*, the words, "and rates of tariff for transportation of freights and passengers." Laws of 1868, pp. 13, 14, sec. 2; and pp. 164, 167, sec. 7; thereby clearly indicating that the *original* terms of acceptance, which are relied on in the case at bar, were not suppsoed to give such legislative power.

To impose "rules and regulations," is a mere matter of police, but in nowise includes, the power to make contracts for the company. If it does, it includes the power to make *all sorts* of contracts, for such "rules and regulations," are not confined in that case to mere matters of rates, but may as well comprehend sales,

mortgages, leases and all manner of contracts. Thus the doctrine asserted, proves too much, and construed as claimed by respondents would, with equal plausibility and legal force, control all the business of the company, even to the forcing them to buy fuel and materials and sell bonds and securities at whatever price, or discount, the legislature might, "from time to time," require. There can be no limit in its operation, if the principle is correct at all; for if it may be applied to one sort of contract, it may to all, and if it may limit any, may limit all. It proves too much, and virtually places the *directory* of the railroad company in the hands of the legisture, without confering on that body the *experience or business capacity* necessary to handling it.

VI.

Nor can this power to regulate rates be claimed as a

MATTER OF POLICE.

Police authority is no greater over railroad companies than over individual persons, engaged in the same business, with or without charter. State *vs.* Noyes, 47 Maine, 189, 211; Redfield on Railways, 550, 552, note. There can be no pretense that the legislature, even by *consent* obtained, can limit a natural person in charges for his labor or services any more than he can sell himself, or the state can sell him by his consent.

These police powers cannot be resorted to for mere love of dominion nor for the mere convenience of the public, nor for fixing or limiting rates of carriage or transportation. The State *vs.* Noyes, 47 Maine, 189, 211, 214, 215.

VII.

State authorities have some times *fixed tolls*, but *tolls* are different from *rates of fare for transportation of freights or persons.* Tolls are that which is paid for the *use* of roads or canals to run one's own vehicle over. But freights and fares are for *services rendered* by the owners of the road *themselves in carrying* freights and persons over the road in the company's own vehicles. Pennsylvania R. R. Co. *vs.* Sly, 65 Penn. St. R., 205; Boyle *vs.* The Philadelphia & Reading R. R. Co, 54 Penn. St. R., 310; Railroad Co. *vs.* Davis, 2 Dev. & Batt., (N. C.) 468, 469. There is a reason for the difference. It is this:

One who pays toll and goes over in his own conveyance, goes at his own risk, as to the manner and care of going, whilst one who is *carried* over by the company goes at the company's risk as for negligence of transportation. So one who pays *toll* and carries his own goods in his own conveyance, carries them as against fire, thefts, robberies, etc., at his own risk, whilst if the company carry the same goods they are *insurers* thereof, except as against the public enemy and act of God. There is no propriety then, in likening one of these to the other, as a precedent for the State regulating the rates. The terms have sometimes been confounded but that does not alter their legal meaning.

This act of the legislature is *confiscation*, under another name. It is no less a monied exaction than if it levied the contribution after the receipts were collected into the railroad treasury. It compels, if enforced, the leaving of just so much money in the hands of the public. It is less reasonable than a direct forced contribution *into* the state treasury, for it enures to the benefit, not of the citizens of Iowa alone, but the people of all the world who do local business on the road. If imposed as a license or use for our charter, it is no less obnoxious to law. The city of New York granted a street railway franchise in its streets and afterwards annually levied a license of fifty dollars a car on the company. The Court held it void as a mere *monied imposition;* that the company having the right already, could not be compelled to pay for what belonged to itself. Mayor, etc. *vs.* Second Avenue R. R. Co., 32 New York, 261; Same *vs.* Third Avenue R. R. Co., 33 New York, 42. It is "an act of high-handed violence, *a forcible seizure of private property.*" Pacefic R. R. Co. *vs.* McGure, 20 Wall.

VIII.

The trustee cannot vary the terms of the trust. An agreement to do so is ultra vires.

The State was but the trustee of the government for the transmission of this benefit by way of aiding in the construction of railroads, which were to remain public highways of the United States, and become post roads. In transmitting the trust, it were incompetent for the state to take from, or add to the burden imposed by the United States, upon the roads, as the price of the benefit to be conferred. It were not only against the policy of the government in making the grant, but all benefits contracted for to the state,

would naturally detract from the power of the company to serve the United States as required, forasmuch as the burdens thus imposed would tend to diminish the means and ability of the several companies to perform their part. For if this burden can be imposed, it may be imposed to such extent as to destroy the road, and thereby defeat the ends and object of the United States government in making the grant. That the State was but a trustee in this behalf, is admitted in the title of the very act of assembly in which it assumes to set up this right of imposing rules and regulations upon the recipients of the grant. It is entitled "An act to accept of the grant, and carry into execution the *trust* conferred upon the State of Iowa by an act of Congress," &c. That a trustee cannot stipulate for a benefit to himself, in executing the trust, is a principle so well settled that we reluctantly refer to authorities. Nor is there an exception in favor of a State. In either event, by whomsoever it may be done, it is fraudulent in law, even if the evil intent be wanting. Green *vs.* Winter, 1 John. Ch. R., 27. "A trustee cannot act for his own benefit in a contrct on the subject of the trust," &c. Parkist *vs.* Alexander, 1 John. Ch. R., 394; Shieffellin *vs.* Start, and others, 1 John, C. R., 620; Brown *vs.* Rickets, 4 John. Ch. R., 303; Davoue *vs.* Fannins, 2 John. Ch. R., 252. In disposing of trust property, the trustee cannot take an insterest therein or by means thereof, Thorp *vs.* McCullum, 1 Gilm., 614; Rensenean *vs.* Blakley, 14 Ill., 15; Switzer *vs.* Skiles, 3 Gilm., 529; Tollansby *vs.* Kilbreath, 17 Ill., 522; Provo *vs.* Gratz, 6 Wheat., 481. And the State cannot *abolish* the *trust*. Irwine *vs.* Marshall, 20 How., 558. It results, therefore, that if it can not *abolish*, it can not *modify* it.

It has been urged, however, that though this be against law, no one but the United States government can object. But this is not like the case of Baker *vs.* Gee, 1st Wallace, 333, wherein a kindred question arose, and was so decided, under a land grant in the State of Missouri. The question there arose in reference to the right of pre-emption in an individual who, upon the faith of the state provision in his favor, made settlement and valuable improvement. The Court held that the R. R. Co. was estopped, to dispute the validity of the terms, as against such innocent settlers, when it had acquiesced therein by accepting the grant with such terms expressed; but, *here*, the right claimed by the state, is political in its nature, and amounts to an amendment to the charter; it is claimed by the trustee for its own benefit, as a mere *volunteer*, and so far as may favor others, they, too, are *mere volunteers*;

for neither the state, or those passengers or shippers claiming the benefit of it, have invested any thing or done any act, or forborne any right or privilege in regard thereto. Moreover, as against the complainant here, as lessee, and as against the owners of the increased stock in the B. & M., invested since 1856, defendant is estopped by equitable estoppel, from setting up such claims for as much as their rights accrued, whilst, by law, said B. & M. Co. was in full exercise of the right to establish fares.

In the Missouri case, the provision inserted by the state, accorded with the policy of the United States, in granting pre-emption rights to the settlers on the public lands; and the disadvantageous effect thereof to the railroad company, was already ascertained, as limited to a few tracts of land, so that the same were known and could be estimated by the company. But here the provision is antagonistic to governmental policy, as the rates may be so reduced, if reduced at all, as to cripple the road and render it unable to subserve the purposes of the United States, declared in the grant, as a post road and as to free use to the government in time of war. This, too, not in a temporary and limited matter of time or quantity, as in the case from Missouri, (1 Wall., 333,) but the effect thereof, if allowable at all, is for all time to come, and to an amount incapable of being known or estimated. Again, if *ultra vires* the law will not aid the state to enforce it, in suits as plaintiff, and we may enjoin her to prevent vexatious litigation.

We do not deny the right to make "rules and regulations," that are of a *police* nature, but deny that "rules and regulations," mean contracts, or limit of contracts, for passenger or freights; and moreover, that if deemed to cover the latter, then we say no such "rules or regulations," may be made by the legislature, for that thereby the charter right of the company to make contracts, would be impaired. As to police rules and regulations, the fact that the power to make these were in the State any how, proves nothing except that the enactment in that respect, was to some extent, a mere work of supererogation, which, with legislative bodies, is no unusual occurrence. Suppose this power to make rules and regulations, exists in the legislature, in regard to corporations, equally as it does in regard to natural persons, yet it will not extend to the making of contracts, for no such power exists in the legislature as the making of contracts for natural persons, or inhibiting them from making their own contracts, consistent with an honest

purpose; more especially, contracts for pay for their own labor or service.

IX.

Said Rate Law is an amendment to the charter, and is unconstitutional in that respect.

Any amendment of a charter or of the law of a charter under which the corporation is created imposing additional burdens or disadvantages upon the company, than those imposed by the law of its origin is void, as imparing the charter contracts and rights of the company, and so likewise of any amendment curtailing or taking away from the company any of its charter powers or rights, unless it be expressly allowed by the charter or law of its creation that such amendments may be made. This law then is void for impairing in that respect the charter rights of the company.

State of Maryland *vs.* the Baltimore & Ohio R. R. Co., 3 How., 534; S. C. 1. Am. Ry. Cases 1, 20; Darmouth College *vs.* Woodward *et., al.*, 4. Wheat., 678; White *vs.* Hait, 13 Wall., 466; Dodge *vs.* Woolsey, 18 How., 331; Railroad Co. *vs.* McClure, 10 Wall., 211.

It is also unconstitutional and void in this, that as such amendment, it violates those provisions of both the old and new constitutions of the State of Iowa, which declare that corporations, except for political or municipal purposes, shall not be created by special laws; but that the organization thereof shall be provided for by a general law. Old Cons., Article 8, Sec. 2, Code of 1850, p. 554; New Cons., Article 8, Sec. 1, Code of 1863, p. 782.

If the legislature cannot *create* by special act, it cannot by special act *amend;* for if it can, it may amend, until like the good old ship *constitution* nothing of the original but the name, is left, and thereby, a new corporation in reality will be created, by doing by peace meal and indirectly, what can not be done directly as a whole. Such amendments are all void when applied to corporations organized under the old constitution, which contains no provision allowing the amendment or repeal of charters Nor will they be rendered constitutional or valid as a law of the land, by consent of the company, however expressly given; for it is obvious that the corporation is not clothed with any portion of the law making power; nor can laws be made by contract. They can only flow from the regular exercise of the plenary power of the law making authority of the state. If that power has no such authority as is exercised by the enact-

ment in question, then no citizen, or corporate body can confer it or render its exercise valid. Hence the actual agreement made by some of the roads herein before adverted to, for the regulation of their charges by the legislature, amount not to law, but merely to an implied contract, though imbodied in a law, for the violation of which contract if any suit lies, it is by the state, and the measure for damages, for the breach thereof would be only nominal, as the over-charge is paid by the passenger or shipper, and does not come out of the state. But no action, or other proceeding will lie by the state as the trustee, to enforce the contract implied by the reception of the grant, for it is in derogation of the rights of the general government; it is a fraud upon the trust; and it is therefore *ultra vires.*

The state, as trustee, could do no more than select the beneficiary. It could not cast about for the best benefit to itself. It could not barter the trust for power; and it could reserve no right but such as it already had. A reservation never *confers* a right. As the state never had the right to make contracts for rates, it cannot claim it as a reservation. So it does not follow that reserving the right to make police "rules and regulations," which it really possessed at the time, enlarged its power into a right to make or to limit contracts for services.

The agreement as to "rules and regulations," if held to cover rates amounts in law to an amendment of the original charter. This could only be consented to by the stockholders in regular meeting. Railroad Company *vs.* Allerton, 18 Wal., 233. Whereas this act of acceptance was by the board of directors. It is, therefore, for this additional reason void.

We are aware, that there are cases, where acceptance of the conditions upon which legislative benefits are conferred, are binding on the company; but not parallel with the case before us. There the act done was not prohibited by the constitution—the legislature had power to grant charters by *special* acts, and amendments, too, if acceptable to the company. State of Maryland *vs*, Baltimore and Ohio R. R. Co., 3 How., 534.

But here special charter acts are prohibited by the constitution; prohibited from state policy; whether agreed to or not by those whose interests are involved. This objection applies with like force to the alleged acceptance of tax aid by the branch roads. The legislature had no power to pass such law.

X.

Want of Uniformity.

Said rate law is also unconstitutional and void in this, that it violates that clause of the old constitution which declares that, "all laws of a general nature shall have a uniform operation;" and also, of the new constitution which makes the same provision, with the additional safeguard annexed that "the general assembly shall not grant to any citizen or citizens, privileges or immunities, which upon the same terms, shall not equally belong to all citizens." Old constitution, article 1, section 6, Code of 1851, page 544; new constitution, article 1, section 6, Code of 1873, page 770. Now this law though general as to all railroads, establishes one rate of compensation for some roads, and other rates of compensation for other roads, making the burden of its interference more onerous for some, and less so or more advantageous to others, arbitrarily and where there is no natural diversity or class distinction between them, and where their construction and use are all upon the same principle and carried on by the same means. In this respect the law is an advance upon *communism* in this, that it fixes compensation for the supposed thrifty, at a lower rate for services, than the compensation which it allows to those supposed to be less industrious, or for other reasons, not so well to do. This same inequality is imposed upon the people, in this—that it virtually takes away from one, and gives to another, as the one cent a mile excess paid by A, on a road allowed to take four cents for passage, is in effect given to B, who travels on a road which is allowed to take only three cents, and therefore only pays three cents a mile. A beautiful system of uniform rates, and of "uniform operation." If based upon the length of the roads, then why not other laws in their application be based upon the length of the person? If upon the wealth of the roads, then why not other laws in their application by a like rule depend upon the wealth of the persons to be effected? There is no disguising the fact that in respect to this enactment, and the assumed control of these corporate charges, the legislature has turned dictator, relying on public prejudice to sustain it, in the exercise of a power, which if acquiesced in by the courts, may in time regulate the price not only of every one's labor graduated in proportion to each one's supposed wealth, but also, the price of all the necessary articles and comforts of life. This would soon put an end to all competition; all industry; all production; and all enterprise; and

would bring about a general stagnation and paralysis of all energies and business of the country; cut off all commerce by destroying its source, as well as the means of carriage, and install a millenium of indolence and apathy instead of our present prosperous and happy condition as a people. But it has been said that this act is not a law of a "*general* nature," but is *specific* in its distinctiveness in reference to different roads. If this were true, then it is void for violating that provision of the present constitution of Iowa, which declares that "*where a general law can be made applicable, all laws shall be general*, and of uniform operation through this state." Const., of Iowa, Article 3, Sec., 30, Code of 1873, page 775.

Having shown as we trust that said act of assembly is inoperative as against the Burlington & Missouri River Rail Road Company, and as effecting the business of said road, we will next consider its relations to the complainant in this bill—the lessees of said road.

XI.

The rights of complainant as lessee.

The lease is admitted by the answer of defendant, and as of date, December, 1872, long *anterior* to the passage of the law now in question. It were sufficient for our purpose, to refer to this law itself for the recognition of the rights of lessees of said road. Sec. 9 of said act. But in January, 1855, an act was passed, by which the use of railroads is allowed to be contracted for, betwixt railroad companies of this and adjoining states, and also to consolidate and manage their roads. Laws of 1855, p. 236, Sec. 1, 2, 3. Revision of 1860, p. 221.

For further recognition of lessee, see acts of assembly of 1868. Laws of 1868, p. 104, chapter 79. Also p. 246, chapter 172. Also, upon general principles, it is settled that a corporation can lease out its road, to a railroad of its own state, or of another state, and the lessee may have all the rights and protection incident thereto, and to the use thereof, if there be no local law expressly prohibiting the same. McClure *vs.* The Manchester and Lawrence R. R. Co., 13 Gray (Mass.) 124; Sprague *vs.* Smith, 29 Vt., 421; Clement *vs.* Canfield, 28 ib., 302; McCall *vs.* Chamberlin, 13 Wis., 639. In short, the general power of making contracts, includes the power both to sell and to lease. Pollock and others *vs.* Maddox. 28 Ala., 321.

But some exceptions have been taken to the legal *status* of complainant, as an Illinois corporation, involving its capacity to sue in the Courts of this state. The suit now involved is in the United States Court, and not in a State Court; and under the judiciary act of the United States, the complainant may prosecute its rights in the United States Court. But it is clear, however, that upon general principles, a corporation in one state may sue in the courts of another state, the same as may natural persons, if there be no local law to the contrary. Story's Confl. of Laws, section 566; Angel & Ames on Corp's, sections 372, 373, 374, 375, 376; Bank of Augusta *vs.* Earle, 13 Pet., 512; Libby *vs.* Hodgenson, 9 N. H., 294; Bank of Marietta *vs.* Pindolf, and others, 2 Rand., 466; British Amer. Land Co. *vs.* Ames, 6 Met. (Mass.,) 391; Frazier *vs.* Wilcox, 4 Rob. (La.,) 519; Bank of Edwardsville *vs.* Simpson, 1 Mo., 5; Bank of Washtenaw *vs.* Montgomery, 2 Scam., 522, 428; Tombigby R. R. Co. *vs.* Leeland, 4 How., 16; Iron Co. *vs.* Dawson, 4 Blackf., 202; Bank *vs.* Devereux, 5 Cranch, 61; Elslava *vs.* Ames' Plow Factory, 47 Ala., 384.

And, under our federal system, it is equally clear, that no state can make any law prohibiting such suit, in either its own courts, or courts of the United States. The remaining, and only other point raised, is :

XII.

As to whether an injunction will lie to prevent the enforcement of the law.

Assuming this law to be contrary to the constitution of the United States, as we think we have clearly shown it to be, has also, a violation of the state constitution as to the rights of the company growing out of their charter contract, the remedy therein is by the preventive writ of injunction, which always lies to prevent the enforcement of an unconstitutional law, and to guard against vexatious litigation. That the Attorney General of the state and the state treasurer, are proper defendants, appears from the law itself, making it the duty of the one to prosecute suits, and of the other under certain restrictions to pay out of the state treasury the expenses thereof. Osborn *vs.* Bank, U. S. 12 Whea. 739; Astrom *vs.* Hammond, 3 McLean, 107; Paine *vs.* Bright, 6 McLean, 339; Baldwin C. C. R., 205; Woolsey, and Dodge, 6 McLean, 142; Foot *vs.* Link, 5 McLean, 616; High, on injunctions, Sec. 570, 571, 572.

We do not discuss the subject of inter-state traffic and commerce, which is exclusively under the control of congress. The answer of the defendants disclaims the right to interfere with our rates in that respect.

In conclusion. The case cited by the Court below, in reference to rules and regulations and the cotton tax, can afford no just precedent to our mind for the one before the Court. That was a war measure—a measure of civil war and military law. Neither the enemy or the government confined themselves to constitutional measures. Absolute powers were necessarily and properly invoked by the government, to save the government, and under some circumstances, the only law was the heaviest cannon. Cases growing out of such a condition of things are not precedents in times of peace, in civil suits involving rights under the constitution. As well to say that the exclusive power of congress to regulate commerce with foreign nations and amongst the states and Indian tribes, confers like power to fix the price of the goods sold and bought, and the tariff of passengers and freights, upon the ocean and national rivers. True, the price of suttlers' goods at military posts are regulated by authority of congress, but that is not only as a military necessity to prevent imposition upon the enlisted men, who are helpless to care for themselves, and are wards of the government, but is a part of the terms on which the office of suttler, which is *always* a *monopoly*, is conferred. Might as well say, that because private ships are licensed by government to navigate our rivers and the seas, that the government may regulate the prices of carriage and transportation thereon, as to say that because incorporated under a law of Iowa, the state may regulate the railroad fares.

DAVID RORER,
Of Counsel for Complainant.

Supreme Court of the United States.

THE CHICAGO, BURLINGTON & QUINCY

RAILROAD,

vs.

THE ATTORNEY-GENERAL OF IOWA,

ET ALS.

Argument of F. T. Frelinghuysen.

HOLBROOK, Printer, 11 Mechanic-st., Newark, N. J.

Supreme Court of the United States.

The Chicago, Burlington & Quincy Railroad, Complainants,
and
The Attorney General of Iowa, and others, Defendants.

STATEMENT OF THE CASE.

The Chicago, Burlington & Quincy Railroad Company is a corporation of Illinois, doing business on its railroad extending from Chicago to Quincy, and having leased the railroad of the Burlington & Missouri Railroad Company, a corporation of Iowa, it continues its business across that State.

On March 23, 1874, the Legislature of Iowa enacted a law entitled "An act to establish a reasonable maximum rate of charges for the transportation of Freight and Passengers on the different Railroads of this State." Session Laws of Iowa for 1874, p 61

The act provides that all the railroads in the State shall be classified according to their respective gross earnings within the State per mile for the preceding year, as follows: Class "A" shall include all railroads the gross annual earnings of which per mile shall be $4,000 or more. Class "B" shall include all railroads the gross annual earnings of which per mile shall be $3,000, or any sum in excess thereof and less than $4,000. Class "C" shall include all railroads the gross annual earnings of which per mile shall be less than $3,000.

Sec. 2. Class "A" is for passengers limited to three cents per mile; Class "B" to three and a half, and Class "C" to four cents.

Sec. 3. The act sets forth a schedule establishing a tariff of rates as a basis for the computation of the compensation for transporting freights over any line of railroads in the State.

Sec. 4. It is by the act rendered unlawful for any railroad cor-

poration to receive for transportation of freight over a railroad of Class "A" more than ninety per cent. of the rates established in the schedule, or over Class "B" more than five per cent. in addition to the rates of the schedule, or over Class "C" more than twenty per cent. in addition to those rates.

Sec. 8. It is by the act made the duty of the Governor to aid in the prosecution of violations of the act, and $10,000 is appropriated for that purpose.

Sec. 11. Any violation of the act by an officer, agent or employer of the company is made a misdemeanor, and subjects them to fine or imprisonment, and the railroad company or officer who shall cause or allow any violation of the act shall pay to the person injured five times the amount of compensation received by the company, and shall also pay to the State of Iowa $500.

The act provides that when the term "Railroad Corporation or Railroad Company" it means all companies now owning or which may hereafter own or operate any railroad in whole or in part in the State.

The Bill of Complaint alleges that a suit has been commenced for violating this act against the Chicago, Burlington & Quincy Railroad Company in the Circuit Court of the State of Iowa, and that the Attorney-General of Iowa is about to commence other like suits. And this the answer admits.

This suit is brought by a citizen of Illinois against citizens of Iowa, to restrain them from harrassing the complainants, from greatly diminishing their income, and from subjecting their officers to imprisonment as for misdemeanor, which irreparable injuries are threatened by a multiplicity of suits, under a law which is void, as violating the Constitution of the United States.

This action may affect Iowa, but it does not contravene the Eleventh Amendment, restraining jurisdiction over suit against States. Jurisdiction depends on the party named in the record. Osborne vs. U. S. Bank, 9 Wheaton, 846.

A void law affords an officer no protection, and the Federal Courts will interfere to restrain action under a State law that violates the Constitution of the United States. The Mayor of Baltimore vs. Pittsburgh & Connellsville Railroad Company, 1 Abbott's U. S. C. C. Reps., p. 91. Equity may be invoked to prevent a multiplicity of suits. Woodruff vs. Fisher, 17 Barb., 224. Garrison vs. Memphis Insurance Company, 19 How., 312.

I. The Chicago, Burlington & Quincy Railroad Company are invested with all the rights of the Burlington & Missouri Railroad Company, being in possession of and operating that road as lessees.

This the defendants deny, and allege that the complainants having no valid right to the possession of the Burlington & Missouri Railroad, are not in a position to set up the rights granted to the Burlington & Missouri Railroad Company against the act of March 23, 1874.

We reply: 1st. That the Chicago, Burlington & Quincy Railroad Company are being proceeded against under the law of 1874, as those having the use and control of the Burlington & Missouri Railroad, and it cannot be denied that the Chicago, Burlington & Quincy Railroad Company have such use and control, or that the charter and franchises, so far as they affect operating the road, attach to the road in whose ever hands it may be.

The Chicago, Burlington & Quincy Railroad Company are sued for penalties for operating the railroad in violation of the laws of Iowa respecting that road. We have a right to look at all of those laws. The Charter of the road is a material part of the law to be considered.

2. Exhibit "G" attached to the bill sets forth the lease made December 31, 1872, which in terms invests the Chicago, Burlington & Quincy Railroad Company with all the rights, franchises and property of the Burlington & Missouri Railroad Company, and the answer admits the execution of the lease.

The 1,334 section of R. Laws of Iowa of 1860, p 221, provides that a corporation which may have constructed a railway so as to connect with any other railway in an adjoining State shall have power to make such contract with such roads in an adjoining State for the use of its said road as to the board of directors may seem proper.

This act clearly gives authority to the Burlington & Missouri Railroad Company to make the contract with the Chicago, Burlington & Quincy Railroad Company.

This act made more clear in its phraseology is re-enacted by the 1,276 section of the Revision of 1873, p 233.

And the 1,278 sec. of R. Laws of 1873, makes the lessees liable to the duties and liabilities imposed on corporations owning the road.

The Chicago, Burlington & Quincy Railroad Company stands in the place of the Burlington & Missouri Railroad Company, invested with the same rights and subject to the same liabilities.

II. The charter of the Burlington & Missouri Railroad Company is a contract with the State of Iowa.

The general proposition that the charter of a private corporation is a contract that falls under the protection of the tenth section of the first article of the Constitution of the United States, which forbids a State to pass a law impairing the obligation of contracts is so well settled by a uniform series of decisions that it cannot now properly be questioned.

Mr. Madison in the 44th Number of the Federalist says that "Laws impairing contracts are contrary to the first principles of the social compact, and to every principle of sound legislation."

In Fletcher vs. Peck, 6 Cranch, 87, this Court held that the law of Georgia in 1795 granting lands, was a contract, that rights vested under it and that the repeal of the act impaired the obligation of the contract, and was therefore unconstitutional and void.

And Justice Johnson there said: "I do not hesitate to declare that a State does not possess the power of revoking its own grant, but I do it on a general principle on the reason and nature of things — a principle that will impose laws even upon the Deity." p. 143.

Parsons Ct. Just. in Wales vs. Stetson, 2 Mass., 146, in 1806 said: "Rights legally vested in any corporation cannot be controlled or destroyed by any subsequent statute unless a power for that purpose be reserved to the legislature in the act of incorporation."

In Ohio Life and Trust Company vs. Debott, 16 How., 428, the Court held that the making of contracts was an exercise of sovereign power recognized as existing by the Constitution of United States, and that they could not be impaired.

Permit a power superior to the State to recognize the State right to impair its contracts and the State is robbed of one of its most valuable powers. A State could not make a contract if it was not obligatory; that being the essence of a contract. To hold contracts not binding would also deprive society of incalculable material advantages, no work of internal improvement can be effected without capital, and capital could not be secured if a contract, which means an obligation which neither party has the power to break was rendered im-

possible. The State itself could by no action give assurance that the contract would be respected. The agitation of this question has already checked the developement of the resources of the country. Chief Justice Taney in the case last referred to says: "There is no one case in which this Court has sanctioned a contrary doctrine." 16 How, 430.

In the Binghampton Bridge case, 3 Wall., 73, the Court say: "All Courts are this day estopped from questioning the doctrine, a departure from it now would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country and unhinge its business interest."

In Minot vs. Phil., Wilm. and Balt. Railroad Company, 18 Wall., 225, the Court says: that the charter of a private corporation is a contract between the State and the corporation, within the provisions of the Constitution, has been settled ever since the Dartmouth College case.

The following decisions show how firmly the position that the charter is a contract and to be protected by the Federal Courts is settled:

Dartmouth College vs. Woodward, 4 Wheat, 513.
Bridge Properties vs. Hoboken county, 1 Wall., 117.
Charles River Bridge vs. Warren Bridge, 11 Peters, 536.
Wilmington R. R. Co. vs. Reid, 13 Wall., 266.
Tomlinson vs. Jessup, 15 Wall., 457.
Holyoke Co. vs. Lyman, 15 Wall., 511.
Bailey vs. P. & W. R. R. Co., 4 How., 389.
Donnahue vs. States, 8 Swedes & M., 649.
Miller vs. State, 15 Wall., 488.
Tinsley vs. B. & D. R. R. Co., 2 Dutch., 148.
Thorpe vs. R. & B. R. R. Co., 27 Vt., 140.
Dearborn vs. B. & M. R. R. Co., 4 Foster, 179.

While the position that the charter of a private corporation is a contract, and inviolable, is too well established to be directly controverted; the effort is to weaken it as applied to railroad charters, by arguing that they are corporations devoted to a public use; that their roads are highways, and exist by virtue of the State's right of *eminent domain*, and that therefore these corporations are to be treated as quasi public corporations—as to which the established doctrine of the inviolability of contracts does not apply—at all

events, the way is thus prepared for asserting that the railroads are subject to that most convenient recourse, the *Police Power* of the State. And if by invoking that power, the Legislature can fix the prices of transportation, they have, in spite of the contract, perfect and full control of the private property of the corporators. They have control of the beneficial use of the corporators' property, and in that consists their property, because that is all of its value.

All this is clearly seen in the opinion in this case.

A corporation is a collection of individuals under a common name, having succession and generally is freed from personal liability :

Angel & Ames, p. 1, Brown Civil Law, 99.
1 Kyd, on Corp., 13 Ch. Justice Marshall.
Dartmouth College vs. Woodward, 4 Wheaton, 639.

A corporation is public when it has for its object the government of a portion of the State—as towns, cities, counties and parishes. Angel & Ames, p. 9, p. 29. Bonaparte vs. Camden & Amboy R. R. Co., 1 Bald. Cir. Ct. R , 222. And a corporation is also public when the Government alone is interested in it—as a National Bank in which no individual owned any stock. Angel & Ames, p. 9. The fact that the State has stock in the corporation does not make it public, for when the State becomes a partner with individuals it divests itself of its sovereign character and takes that of a private citizen. Bank of United States vs. Planters' Bank of Georgia, 9 Wheat. R , 907.

A private corporation is distinguished from a public corporation in that it is neither political or one in which the Government alone is interested. Over the public corporations the Legislature has unrestrained control, but private corporations are created by an act of the Legislature which is regarded as a contract, and which the Legislature is Constitutionally restrained from impairing by annexing terms and conditions inconsistent with the liberal and rational construction of the grant. Angel & Ames, p. 27, and Bailey vs. Mayor of N. Y., 3 Hill, (N. Y.,) 531 ; Marelta vs. Fearing, 4 Ohio R., 427.

In the creation of a public corporation the State is the sole party, the elements of a contract do not exist ; to private corporations are two parties, one to grant a charter and another party who accepts the charter, on the terms stated, and when the contract is executed the rights under it are vested.

As the Burlington & Missouri Railroad Company is clearly a private corporation its charter is a contract, and the railroad and appurtenances the private property of its corporators.

It is true that the corporation was created for a public use, but that fact in no manner militates against its property being a private property. The Burlington & Missouri Railroad Co. own the railroad and its many appurtenances, but own it subject to its being perpetually used by the public for the transportation of persons and property for a compensation. The fact that it is so subject in no manner interferes with its being private property. And if private property, it cannot be wrested from its owners or its value impaired by any legislation inconsistent with the charter under which it is held.

As the object of the corporation is a "public use," the State under its *police power* may at all times by general laws regulate the exercise of the corporate franchise, so as to promote the welfare of society, as by regulating the mode of carriage of passengers, the speed of trains, safety at crossings, etc.; but that police regulation which may be exercised, is entirely different from legislative action which touches the constitution of the corporation, abridges its powers and invades its property as by taking from the corporation the administration and control of its own property, for which purpose the Company was incorporated. The Court of Appeals of Delaware in the case of Philadelphia, Wilmington & Baltimore Railroad vs. Bower, March No. Law Register, 1874, p. 174, says in speaking of the attempt of the Legislature under the police power to adjust a tariff of charges: "These are not police regulations, but are in substance and effect amendments of the charter, and it is most obvious that if under color of the police power, corporations may be thus dealt with, the constitutional provision so solemnly adjudged by the Supreme Court to be a protection to their rights is after all as to them wholly nugatory."

The police power cannot conflict with the charter or take away essential rights. Cooley on Court Lien, 577. In Benson vs. The Mayor, 10 Barb. 245, the Court says: "Franchises of this kind are partly of a public and partly of a private nature; so far as the accommodation of passengers is concerned, they are publici juris; so far as they require capital and produce revenue they are privati juris. The State may legislate touching them so far as they are publici juris. Thus laws may be passed to prevent neglect or mis-

conduct in conducting the ferries, or to secure the safety of passengers from danger or imposition; but the State cannot take away the ferries themselves nor deprive the city of their legitimate rents and profits."

The Legislature, under the Constitution of the United States, is not to impair the contract in any way, it is not to render it less valuable. The prohibition is not that the Legislature must not by a certain process impair the contract, they must not do it any way, it is not a question of manner or cause, but of fact. They are not to impair the contract in any way. Neither is it a question of degree or how must they impair it; they may not in any way dispense with any part of the force of the contracts.

Planters' Bank vs. Sharpe, 6 How, 326.

McCraken vs. Hayward, 2 How, 612.

Cooley Const. Lien, 285; Pingery vs. Washburne, 1 Aiken, 268.

It is true that the public to which the railroad is devoted is that of a HIGHWAY, and that the construction of highways is a prerogative of the State, and that the State may by taxation construct railroads or other highways and let the people use them with or without charge. But if the State contracts with individuals associated as a corporation or otherwise to construct a common highway or a railroad, there is nothing in the fact that it is the State's prerogative to construct highways that relieves it from the obligation to pay the consideration stipulated for the construction—to wit, the management of its own business, subject to legitimate regulation—compensation for the use of capital. for personal service in running the road, and for being insurers to a large extent of the safety of persons and property transported on it.

This claim that a railroad is a highway—if by that term is intended a highway of the people—is a flight of the imagination. If it is a highway as that term is understood at the common law and as it must be understood to be the basis of an argument, then the townships through which it runs are indictable unless it is kept in order. But that is not so. The People vs. Flagg, 46 New York Reps, 401.

The opinion of Judge Dillon, who decided this case below when he was Chief Justice of the Sup. Court of Iowa in 1869, is worthy of note on this point.

The question was the validity of the law levying a tax of five per cent. in aid of railroad construction, and is found in Hanson vs.

Vernon, 27th Iowa R. p. "It is established by the foregoing principles, that, unless the tax of 1868 is laid for *public purposes*, the law cannot be sustained. I argue that it is not a tax laid for *public* purposes, because the donee thereof is a mere *private* corporation, voluntarily organized, for pecuniary profit, and whose ultimate business is that of a mere common carrier."

And again Chief Justice Dillon in the same case says:

"*If* the Legislature could abolish railroad corporations, restrict their chartered powers, and control their rights and property, the same as they can do with respect to municipal or civil corporations, there would be some ground for holding that they were not essentially *private*. If these corporations are not *private* then they are *public*, and if public, they are subject to the unlimited control of the Legislature, which may enlarge or restrict their rights and powers, or even abolish and destroy them at its pleasure, the correctness of which these corporations would in any other case be the last to admit. That such corporations *are private* and *not public*, is a principle of law *so well settled* that it has not even been questioned by counsel. *No case can be found which denies it.*"

And again the Chief Justice says:

"Again it is urged, in support of the act of 1868, that railways are simply improved highways, and that taxes in aid of their construction stand upon the same principle as ordinary road taxes; that the State might itself build a road and pay for it out of the public revenues raised by taxation, so it may if it chooses authorize such taxes in aid of private railway corporations. This argument is unsound. The ordinary highway is the common property of all, for the common use of all, and the jurisdiction and control over it on the part of the Legislature as the representative of the public is absolute and unlimited. *In all these respects a railroad is different.*"

These judicial utterances of Judge Dillon are in striking contrast with those of his opinion given in the case in hand, where he refers to the public character of railroads as a justification of the legislative attempt to regulate their tolls. Tolls are their property and all of it.

It is claimed that as the STATES RIGHT OF EMINENT DOMAIN was invoked to effect the construction of the railroad, that the road when constructed is under the control of the State.

A very small part of the roadway of the railroad company is

taken under the right of eminent domain, and the entire roadway constitutes but a small part of the outlay of the corporation. That outlay is for the roadway, the grades, ties, track, bridges, depots, machinery, shops, outside lands and equipment, all of which are admitted to be private property. And the corporation would pay a fearful penalty for the limited use of the power of eminent domain, if they thus subjected all their rights and the value of their entire property to Legislative control.

There are some decisions made in the infancy of the law relative to internal improvements, which favor the idea that when the right of eminent domain is invoked to construct the road, that the road must be under public regulations as to tolls, or be owned or subject to be owned by the State. In the case of Railroad Company vs. Chappell, 1 Rice, S. C. 383, decided in 1838, it was held that "a railroad must be held as a part of the public domain, farmed out to individual men for its practical administration and order alone." This is a plausible statement to reconcile the public, then not prepared to appreciate the value of internal improvements, with the delegation and use of the right of eminent domain; but this authority does not question the right of the party who builds and administers the road to the legitimate profits springing from it. In Beekman vs. the Saratoga and Schenectady R. R. Co., 3 Paige 45, p. 74, decided in 1831, more than forty years ago, Chancellor Walworth says: "The Legislature may, also, from time to time regulate the use of the franchise and limit the amount of toll that it may be lawful to take, in the same manner that they may limit the amount of tolls to be taken at a ferry or for grinding at a mill, unless they have deprived themselves of that power by legislative contract with the owners of the road." In the West River Bridge Co. vs. Dix, 6 Howard, 546, decided in 1847, nearly thirty years ago, the question being whether the franchises of the company could be taken for a public use, Justice Woodbury drops the suggestion that the improvement "must be under public regulation as to tolls, or owned or subject to be owned by the States to make the corporation and object public for the exercise of the right of eminent domain." Relying on the remote and unguarded dicta of such cases, made not to decide causes, but to reconcile the public to the use of a power which the Courts, for the want of the knowledge of results now possessed, looked upon with suspicion and jealousy, it was held in 1870, in Whiting vs. Sheboygan & Fond du Lac R. R. Co.,

25 Wis., 196, thus: "the public use, which has been held to justify the application of the doctrine of eminent domain, in the case of railroads owned and operated by private individuals, consists in the fact that the owners cannot, without reasonable excuse, refuse to receive and transport passengers or freight, when offered, at usual rates, and in the fact that *the State retains the power to regulate and control the franchise, and limit the amount of tolls which it shall be lawful to charge.*"

A third of a century has elapsed since the dicta on which this decision rests were dropped. The generation that has in that period lived has been distinguished for having, through the use of the State's right of eminent domain, originated and perfected those internal improvements which have given life to every locality, and, during that whole period, the power of eminent domain has been exercised to build public works without the State retaining the right to "*limit the amount of tolls to be charged,*" and the doctrine that this use of that power is so restricted has not been generally, if ever, asserted or acted upon by either the Courts or Legislatures. If the exercise of this power was in law thus limited, that limitation would have been uniformly asserted. It was not until it was thought that those who use railroads should fix the price for such use, that the consumer should determine the price of the thing to be consumed, that a microscopic search was made into the early twilight of the history of internal improvements to find unconsidered expressions in aid of a theory to meet a passing popular view.

The case in 1 Rice, which asserts, "that a railroad is to be held as a part of the public domain, farmed out to individual men for its *practical administration and order alone,*" and in no manner controverts the truth that the "individual men" are to be paid as other individual men, for the use of their property and for attention to the "administration and order" of the road, and for the Association being liable to respond for damage to person and property.

If the State should confer on a partnership engaged in building a road mainly over lands purchased, the right to condemn a small section of the roadway, as it might lawfully do, there is nothing in the fact that the partnership had thus made title to this small section that confers on the State the right to fix the compensation they should receive in their entire business. Corporators have the same rights as partners, with this deduction: that they are responsible to the judicial power for the non use or misuse of their fran-

chise, and with this addition that they have succession and generally freedom from personal liability. There is nothing in the fact that the power of eminent domain is exercised by a corporation that gives any right to fix charges—for that power may be delegated to individuals, as well as to a corporation. In the case in 3d Paige, the Chancellor argues that the Legislature may fix the tolls on a railroad because it may do so on a ferry. The illustration does not tend to prove, but to disprove the position it is invoked to sustain. A State may regulate the tolls on ferry, because the way traversed is the property of the State; nothing has been paid for it, and for the same reason as the railway traversed is the property of the corporation, and as they have paid full price for it the corporation may fix the tolls.

In the case in 6 Howard, Justice Woodbury, if he is to be understood as holding that the legislature and not the judiciary may regulate the tolls, (he says the State) only manifests how crude were ideas thirty years ago as to the lawful use of the power of eminent domain. He asks "Who ever heard of laws to condemn private property for a marine hospital or a States prison?" and then places a custom house, a court house and a jail for a State in the same position. At this day no one would question the right to condemn property for these purposes.

Congress has passed such laws as to post offices, and Judge Cooley in Con Lien p 537, asserts that the power of eminent domain may be delegated in cases of district schools, court houses, jails, city halls, reservoirs, sewers and other public works of like importance.

The cases referred to afford little support for the remarkable doctrine that when the power of eminent domain is used the State retains the right to limit the tolls to be charged.

This power of eminent domain has been delegated to gas companies, to water companies, to an oil company, to obtain a way for pipes to navigable waters, 5 West va. 382, but the State does not claim the right of fixing the prices of the gas, water or oil.

Thus to limit the exercise of this power would be to rob the State of one of its most important powers, and to deprive society of most valuable benefits of government. If the doctrine be true that the right of the legislature to control fares and freights is a necessary incident to the use of the power of eminent domain, then all railroads existing are so subject, any provision to the contrary

in their charter is unconstitutional and void, and what is even more to be deprecated is that the fundamental powers of government are disastrously weakened; for while in the future capitalists would withhold all investments from a business that was to be entirely subject to the changing caprice of the legislature, there would be no powers anywhere to relinquish the right to that control. Improvements would cease and society suffer.

The power of eminent domain can be used always when its exercise is for the public good, and private property can always be taken against the will of the owner for a public use. The legislature determines whether a railroad is for the public good, and the fact that the railroad is subject to the perpetual servitude of carrying persons and property shows it to be for a public use, but the fact that the property is devoted to a public use does not make it a public property or subject it as private property to confiscation, or what is the same thing to having the profitable use of the property subjected to an unrestrained legislative will.

Justice Story in Dartmouth College case, 4 Wheat, 509, limits the State right to control to cases when the corporation is in the strictest sense public, that is, when the whole interest and franchises are the exclusive property and domain of the government itself.

In Minot vs. Philadelphia, Wilmington & Baltimore Railroad Company (18 Wall, 206), Justice Fields, after saying that the charter of a private corporation is a contract between the State and the corporators and within the provision of the Constitution, adds this: "Nor does it make any difference that the uses of the corporation are public, if the corporation itself be private. The contract is equally protected from legislative interference whether the public be interested in the exercise of its franchise or the charter be granted for the sole benefit of the corporators."

The right of eminent domain incidentally used is one of the franchises granted for a consideration. Angel & Ames, sec. 40.

In The People ex al vs. Salem, 20 Mich., 477, Court says: "The road, when constructed, is nevertheless exclusively private property, owned, controlled, and operated by the private corporation for the benefit of its own members, and to be subject to the control of the State only as other private property," and further says, "Railroads are private property whose owners make it their business to transport persons and merchandise in their own carriages over their own road for such pecuniary compensation as may be agreed."

In People vs. Batchellor, 53 N. Y., 128, speaking of railroads, the Court says: "But it is equally clear that property acquired by the corporation belongs to it exclusively, and its ownership is as absolute as that of any private individual's property.

"It is also clear that so far as the road is operated for the benefit of the stockholders the corporation is private. We have then an artificial being created by the Legislature, endowed with public franchises, the absolute owner of property, of which it cannot be deprived by legislation, except for public purposes, carrying on business for the private emolument of its stockholders."

In State Freight Tax, 15 Wall, 233, Justice Strong says: "We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the State or grantees of franchise from the State, to exact what they please for the use of their ways. That right is an attribute of ownership."

And again the Justice says: "But in truth the State has no more right to demand a portion of the tolls which the grantees of the franchise receive, than she would have to demand a portion of the rents of the land which she has sold. "She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach."

Though the road of the Burlington and Missouri Railroad Company is devoted to public use though the power of eminent domain was invoked to aid in its construction, and though the road may in some sense be a highway, yet the charter of that company is a contract within the meaning of the Constitution of the United States.

IV. The charter of The Burlington and Missouri Railroad Company is a contract that the company shall fix, exclusively of legislative control, its own tariff of charges.

1. The general rule of CONSTRUING GRANTS from the King is, that they are to be taken most strongly in favor of the King.

The reason, therefore, as appears by Bacon's Abr. title Purrogative F, and the authorities there cited, is because such grants proceed chiefly from the King's bounty; but Bacon says further, under the same head, that where the "King's grants are upon a valuable consideration, they shall be construed favorably for the patentee, for the honor of the King." Citing 2 Inst, 446-7; 10 Co. 65.

In Sir John Molin's case, Coke's Reports, part VI., p. 6, Coke

says: "Note the gravity of the ancient sages of the law, to construe the King's grant beneficially for his honor, and the relief of the subject and not to make any strict or liberal construction in subversion of such grant."

Again Bacon says: "The law, allowing the grant good, gives by implication to the grantee the necessary means of obtaining the benefit of it." Same reference.

In the case of The Great Western Deep Coal Company, 12 Law Times (N. S.) 842, it is stated that "It is a settled principle of law that not only as between the Crown and the subject, but also between subject and subject, the reservation of a right implies the means of enjoying it.

See also 2 Barn & Cres., 212, Earl of Cardigan vs. Armitage. In the case of the Corporation of Stamford, 1 Compton & Jervis Rep 3, p. 57, the Court reviewing the cases, held that when toll is *not* incident to the franchise granted there must be a special grant of it, but that a grant to take tolls without specifying the amount was a grant to demand and receive reasonable rates of tolls. In the People vs. Batcheler, 53 N. Y., 140, it is held that tolls are incident to a grant of a charter for a railroad. This, however, is manifest. It is what corporators seek in the construction of railroads.

2. The Burlington & Missouri Railroad Company, in undertaking to construct their railway and in constructing it, gave a valuable consideration for the grant of their charter, whether you view its cost to them or its benefit to the public, and on authority the grant is to be construed favorably for the company.

If the grant to Burlington & Missouri Railroad Company gave only the right to build the railroad and run it as common carriers for hire, the grant by necessary implication gave the means of obtaining the benefit of it by the receipt of reasonable tolls.

Authority concurs with reason in saying that under their charter the Burlington & Missouri Railroad Company have a vested right to receive reasonable compensation. And as the company is by its charter intrusted with the right and duty of administering the road, the company has primarily the right to determine what are reasonable tolls, for none but reasonable tolls, we shall see, can be established or collected.

In the absence of any reservation, the right of the company to

fix a reasonable rate of charges is as much an incident of the grant as is the right to receive reasonable tolls. If one sent freight over the railroad without any contract, the company could unquestionably recover reasonable compensation, and if one sent freight under a contract, surely the performance of it could not be resisted as "ultra vires."

It seems almost a violation of propriety for me to assume that it is necessary to argue that a company that has under the State's grant built a railroad, has by necessary implication the right to fix their tolls, subject only to judicial control. Tolls are the object of the grant as far as the grantees are concerned. It is for tolls they asked and received the grant. They are not engaged in the philanthropic purpose of relieving the government from the burdens of highway; theirs is a business, a money enterprise, which responds only in tolls. The power to issue stock, make bonds, bridge rivers and condemn lands are, so far as the grantees of the charter are concerned, only subsidiary to tolls. The State has conferred on the grantees of the charter a discretion as to tolls, the exercise of which is inconsistent with sovereign legislative control, but entirely consistent with judicial supervision. Tolls, too, are beyond the province of the police power. Private property can be seized under that power, but only when there is such an exigency that there is no opportunity to resort to measures more respectful of private right. It may be resorted to so as to affect private right or private property only in the case of extreme necessity. Private property may under this power be destroyed to stay a conflagration, to prevent a flood, to avert a pestilence, or in the exigency of war.

To hold that the grantees of a railroad charter who have built the road have not by necessary implication a right to tolls and primarily to fix what they shall be, or that the discretion they exercise in fixing tolls is subject to the uncontrolled will of the sovereign power, rather than to the investigating supervision of the judiciary, or that the police power can in any manner be invoked in relation to tolls, is not so much doing violence to any one particular principle of law, as it is doing violence to the whole system of jurisprudence. Let me here refer to what Chief Justice Dillon so well says in the five per cent. tax case of Hanson vs. Vernon:

"It is to be remembered also, that railway corporations are not organized for the purpose of developing the material prosperity of

the State; this is a mere incident of the business they prosecute. But they are organized solely to make money for their stockholders, and the Legislature have *no more power over their property or rights* than it has over the property and rights of natural persons or other private corporations organized under the same general law. How it can be said that the voluntary use of private capital, for the exclusive advantage and profit of those who contribute it is a *public use* of it, justifying compulsory taxation in favor of private undertaking, surpasses my ability to understand."

The learned Judge admits in his opinion in the case at bar, that railroad companies have a right to tolls and a right to fix them, but claims that the companies have not the *exclusive* right to fix their tolls. To hold that the State has granted the companies the right to exercise their discretion in fixing their charges, and yet that the sovereign power of the State can override that discretion is to hold that the State has at the same time given and not given a franchise. The reservation insisted on is repugnant to the grant, that is admitted and therefore cannot be allowed. The discretion covers the whole ground, excepting where the discretion is abused, and then the judiciary gives the relief required.

The learned Judge was right, in 1869, when he said that "the Legislature have no more power over their property or rights than it has over the property or rights of natural persons or other private corporations, organized under the same general law." And if he was right then, he is very wrong now, when he claims that the rights and property of railroad companies are subject to a control as unlimited as legislative sovereignty. For it's that control or it is none.

3. The Burlington & Missouri Railroad Company has not only by necessary implication, but by the *express words* of its charter, not only the right to compensation, but the right to fix, exclusively of the Legislature, its own tariff of reasonable charges.

The articles of incorporation of the company, filed January 23, 1852, were made under the general incorporation act of Iowa (Code of Iowa of 1851), which provides that among the powers of such body corporate are the following:

"Sixth. To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy."

Here is an *express* grant of the right to receive tolls for the

transportation of passengers and freight. A railroad company has no legitimate mode of acquiring property but by the receipt of tolls for transportation, or it is at least one of the contemplated modes of acquiring property

It is equally clear that here is an express grant of the right to fix their own tariff of charges. All transportation over the road is performed on contract either special or according to the tariff (which the company by section 1,304, 5 and 6, p. 239 of Code of 1873, are required to publish.) The Charter of the Company conferred on them the right to make those contracts which necessarily attach to every item of their contemplated business, or in other words to make contracts for tolls. But the charter goes further and provides that the company shall possess the right to make contracts in the same manner that private individuals enjoy that right. A private individual makes a contract not by submitting the price he charges to an umpire to be charged at pleasure as is proposed by the act of 1874; he makes it according to his will; constraint or duress renders the contract void.

If the grant is held to confer the right to make contracts only as private individuals who are in the same kind of business enjoy that right, such construction does not help the claim of the legislature to control the tariff of charges. Stage coachmen, expressmen, any common carrier is bound at a uniform rate to carry, if practicable, the passengers and freights offered, but they make their own tariff of charges. A hackman who uses as a business the paved streets and public stands of a city and takes from the city a license containing the restriction, is by contract subject to the tariff of charges the city authorities may fix in the same manner as is a railway company the charter of which gives the legislature the right to control its charges. But here the railroad company has by its charter the express and unqualified grant of the right "to acquire property" and "to make contracts," "possessing the same powers in such respects as private individuals."

By both implication and express grant the company is entitled to establish and to receive reasonable tolls.

Unless it is so stipulated between the company and the State in the grant the legislature has no right to determine whether the charges of the railroad company are or are not reasonable. It has no more right to decide this question than it has to decide upon the title to the homesteads of its citizens, or whether they are or are not guilty of

crime. It is not the province of the legislature, *and it has no inherent or constitutional authority* to decide whether any right is properly exercised. That due process of law without which the citizen may not be deprived of property is not committed to the legislature. It has no jury and that must be 'preserved.' It has no facilities for obtaining either the witnesses in the citizen's favor or those who are to confront him. It can pronounce no judgment, but must substitute for it an edict for which no reason is required, from which there is no appeal, and for which though the result of caprice there is no official responsibility.

In the case of the Baltimore & Ohio R. R. Co. vs. Maryland, decided in this Court, October Term, 1874, 21 Wall, 456, a question arose on the effect to be given to the charter which provided that the company should pay to the State one-fifth of the whole receipts of the road, and Justice Bradley says: "The grant of the right to build the road and operate it was Constitutional; the right to charge fare and freight was Constitutional; the amount of such fare and freight would have been entirely in the discretion of the company if it had not been limited by the grant," and, in treating of the Constitutional rights of the Legislature to fix, *in the charter* the amount of compensation the company was to receive, he says: "The Legislature has a discretion as to the amount of compensation. That discretion is a legislative—a sovereign discretion, and in its very nature is unrestricted and uncontrolled." To that discretion in making laws within the province of the Legislature, we all willingly submit, but to compel the citizen to refer a question as to the proper exercise of his rights to an unrestricted, uncontrolled sovereign discretion, is not justice but tyranny.

What could be more illogical than to hold that the Burlington & Missouri Railroad Company have, by an inviolable contract, as against the Legislature of Iowa, the right to receive fares and freight, but that the Legislature of Iowa has a Constitutional right in the exercise of its unrestricted, uncontrolled sovereign discretion to make those fares and freight as small as it sees proper.

Whether the charges of the company are reasonable or not, is a *judicial question.* It depends on facts; on circumstances that are changing; on the price of labor; the cost of the road; the value of the currency, etc.

In Stanford vs. Paulet, 1 Compton & Jervis R. p. 57, the Court says:

"The grantee demands it at his peril and at the hazard of a private as well as a public prosecution; of a private at the suit of the party injured; of a public at the suit of the Attorney-General in the name of his majesty."

In Philadelphia, Wilmington & Baltimore R. R. Co. vs. Bower, the Court states that the Legislature may, by general laws, forbid extortion and unjust discrimination on the part of railroad or other common carriers, and that corporation would be held liable, and then adds: "But such liability would be enforced by a judicial proceeding in which the alleged extortionate or unjustly discriminating character of the charges drawn in question, would be judicially ascertained." "Very different, however, from such a mode of regulation by general laws, with a liability to judicial remedy, is the attempt by a Legislature to prescribe, in advance, a law of charges for carriers—to do which is an effort to take out of their hands the management of their own business."

In the Commonwealth vs. Proprietors of New Bedford Bridge, 2 Gray, 349, the question was the validity of a law of 1851, requiring the proprietors to make the draw 60 feet wide, it having been by them constructed under a charter requiring it to be constructed with "*two suitable draws*, which shall be at least 30 feet wide," the Court held that the Government had become a party to a contract and thereby divested itself of its sovereignty as to the subject matter of the contract, and that the question whether the bridge was built with suitable draws, was exclusively a judicial question and that, therefore, the law of 1851 was void. And the Court says, further:

"Whether the defendants have in fact complied with the terms of their charter by constructing their draw in a *suitable* manner, * * * * is to be settled in the regular tribunals, where questions of law and of fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure an impartial administration of justice."

In the Chicago and Alton Railroad Company vs. The People, 5 vol. Chicago Legal News, 206, the same doctrine was held.

A statute was passed to prevent unjust discrimination on railroads and made it conclusive evidence of such discrimination for a railroad company to transport the same quantity of freight for a greater distance for the same amount that it did for a lesser distance, and the Court held the object of the statute was a good one,

but held that the Legislature could not make what might be an innocent act, conclusive evidence of guilt. The Legislature must confine itself to its own province.

It is clear that it is the duty of the Court and not the Legislature to decide on the reasonableness of railroad charges.

V. The fact that the State of Iowa, when acting as trustee to select a railroad company that should receive land devoted by the general government to the construction of a railroad, required the Burlington and Missouri Railroad Company, in order that they might be so selected, to stipulate that the company should be subject to *such rules and regulations* as the Legislature of Iowa might enact, gives that Legislature no right to determine the tariff of charges of the company.

Congress, May 15, 1856, made to Iowa a grant of land (Code of Iowa, 1860, p. 916), "for the purpose of aiding in the construction of a railroad from Burlington on the Mississippi River, to a point on the Missouri River, near the mouth of the Platte River."

The Burlington and Missouri Railroad Company then had a charter for a road between those termini and a road partially constructed.

The grant from the United States provides that the lands shall be "exclusively applied to the construction of that road for and on account of which such lands are hereby granted," and that "the same shall be applied to no other purpose whatsoever," and again, that the lands granted to the State, "shall be subject to the disposal of the Legislature thereof, for the purpose aforesaid, and *no other*."

And the grant further provides that the railroads "shall be and remain public highways for the use of the Government of United States, free from toll or other charge upon the transportation of any property or troops of the United States, and that the United States mail shall be transported over said roads at such price as Congress may by law direct."

The State of Iowa, July 14, 1856 (Code of Iowa, 1860, p. 215), accepted the grant by an act of the Legislature, "Upon the terms, conditions and restrictions contained in the said act of Congress."

The Legislature, July 14, 1856, selected the Burlington and Missouri Railroad Company as the company to receive the benefit of the grant, on condition "that the company accepting the provis-

ions of this act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided by the General Assembly of Iowa, not inconsistent with the provisions of this act, and the act of Congress making the grant."

It is claimed that the State of Iowa having selected the Burlington and Missouri Railroad Company, on the conditions stated, and the Burlington and Missouri Railroad Company having accepted the benefit of the grant on these conditions, the Legislature of Iowa has the right at its unrestrained, uncontrolled, sovereign discretion to say what the charges of the company for fare and freight shall be, and to change those charges at its sovereign pleasure from "time to time."

And the learned Judge below, not being quite prepared, in the face of the charter contract existing between the State and the company, to decide on principle that their charges were subject to the will of the Legislature, maintains the right of the Legislature to determine those charges on the ground that the Burlington and Missouri Railroad Company agreed that the Legislature should have this power, when the company accepted the grant on the conditions stated.

The right to make "rules and regulations," means the right to exercise legitimate police jurisdiction over the road, and not the right to regulate at will the charges of the company, and thus to invade their property rights. It seems from the opinion in the case below, to have been most naturally suggested by counsel to the learned judge, that the stipulation authorizing the Legislature to make "rules and regulations," only conferred on that body a police power, not affecting property.

To this suggestion the Judge made this and only this answer: "But the power to regulate the public and general management of the road as a highway existed before, and the interpretation suggested is open to the objection of making an important provision to which the Company was solemnly required to assent useless and unavailing."

The Judge's difficulty was that making the stipulation to confer police jurisdiction did not satisfy the demands of the stipulation because the State had that power before. His difficulty would have been removed and perhaps an opposite result reached, had he observed that the Legislature of Iowa had very improperly but expressly conferred on the ~~Baltimore & Ohio~~ Railroad Company, the

right to make the "rules and regulations" for the management of their business, to wit: the running of the railroad. This right is conferred in these words (Code of Iowa, 1851, p. 109): "To establish by laws and make all *rules and regulations* deemed expedient for the management of their affairs, in accordance with law, and not incompatible with an honest purpose." The Legislature could see to it that the "rules and regulations" were for no dishonest purpose, and that they did not violate the general laws of the State, but the Company within those limits had a chartered right to make not only the by-laws for the management of their organization, but also to make their own "rules and regulations" for the management of what is properly termed their affairs."

The State wished the unrestricted police jurisdiction of the road. They asked for it, and the company surrendered it to them, not as a "quid pro quo," but as a matter of propriety. It is apparent that the Judge below had not observed this provision of the law, because in treating of the question whether the company had the *express* grant of the right of regulating their charges, he says in his opinion that "the statute nowhere *in terms* confers upon railway corporations organized under it, the power to fix or regulate their charges." This we of course do not agree to. But it is clear that the Judge, under his view of the meaning of the term "rules and regulations," would have reached the opposite conclusion, had he observed that the statute gave railway companies the right to make their own "rules and regulations," for if that term used in the stipulation confers upon the legislature the right to fix the charges of railway companies he certainly, had he noticed the provision, would have held that the words had the same significance in favor of railway companies as found in the statute. The same words would not mean opposite things when invoked in favor and when invoked against railway companies. Had the provision been observed, a sufficient office for the words of the stipulation to perform would have been found without making them to effect an entire surrender to the State of the control of the company's property.

That the Legislature never understood the stipulation to confer the right to fix fares and freights is abundantly manifest from the fact that for twenty years since it was made the Legislature never assumed or claimed over this company the extreme power of fixing fares and freights now asserted.

That the Legislature understood that the term "rules and regulations" gave no right to fix a tariff of charges is made further apparent by contrasting the phraseology of the stipulation in question with that of other stipulations when the Legislature sought to secure the right to fix the rates of fares and freights.

The law of Iowa, Code of 1860, p. 204, 206, authorizing County Courts to grant leases for ferries, bridges and canals, provides that the Court may (not make rules and regulations), but may *prescribe the rates of ferriage*, and may "fix a maximum rate of tolls" and render the rate unalterable for twenty years.

They not only know the use of language, but also the importance of a company not being from "time to time" subject to having their rates changed.

The Mississippi & Missouri Railroad Company, a corporation existing under the Constitution of Iowa of 1851, which Constitution did not reserve the right to alter and amend, became insolvent, and the Chicago, Rock Island & *Pacific* Railroad Company became the purchasers, at a judicial sale, of all the rights of the former company. The Chicago, Rock Island & Pacific Railroad Company consolidated with The Chicago & Rock Island Railroad Company, under the name of The Chicago, Rock Island & Pacific Railroad Company. The State of Iowa passed an act recognizing the consolidation and granting lands; but as the Chicago, Rock Island & Pacific Railroad Company was, by the purchase at the judicial sale, invested with all the rights of the Mississippi & Missouri Railroad Company, a corporation under the old constitution, the State inserted in the act, recognizing the sale and granting the lands, this provision:

"Provided said railroad company accepting the provisions of this act shall at all times be subject to such rules and regulations *and rates of tariff for transportation of freight and passengers* as may from time to time be enacted and provided for by the General Assembly of the State of Iowa."

Pamp. Laws of 1869, p. 13.

Here we have the identical law guage used in the act under which the Burlington & Missouri Railroad Company accepted the lands, only that here the company, in addition to being subject to "rules and regulations," is made subject to "the rates of tariff for transportation of freight and passengers."

This act shows that the Legislature of Iowa were fully aware

of the rights that railroad companies had under the old Constitution of 1851, and wished to extinguish them, and fully appreciated the difference between the right of making "rules and regulations" and that of fixing "the rates of tariff for transportation of freight and passengers."

Again: The Dubuque & Sioux City Railroad Company, a corporation created under the old Constitution, transferred its franchises and property to The Iowa Falls & Sioux City Railroad Company, the State confirmed the transfer in the language of the provision last quoted, adding to the "rules and transportation" the word "rates of tariff for transportation, &c"

Pamp. Law, 1868, p. 167.

A like provision is found in the case of Des Moines Valley Railroad Company.

Pamp. Laws, 1868, p. 66.

A like provision as to the McGregor and Sioux City Railway Company. Same, p. 68.

A like provision as to the Tete Des Moines Branch Railroad. Law of 1872, p. 72.

On April 12, 1870, an act was passed to enable towns to aid in building railroads, and section 4 provides that:

"All railroads constructed by and with the aid of any taxes levied or collected under the provisions of this act, shall be subject to the control of the General Assembly, in regard to the management of the same, *and in the charges for transportation of freight and passengers thereon.*"

These instances might be multiplied, but we have enough to show that when the understanding is that the State is to regulate *charges*, the law distinctly says so. If the term "rules and regulations" was understood to include fixing the railroad charges, the words, "rates of tariff for transportation" would not have been uniformly added.

Under a mere power to make "rules and regulations," the State cannot claim the right to take property, and that is what is claimed here. The railroad is the property of the company—its value to them consists solely in its net earnings. Before the power to make "rules and regulations" was by the acceptance of the grant of lands conferred by the company upon the State, the company had the right to fix the reasonable compensation they were to receive so as to secure a profit; that was an element of

their property. This is not denied; it is only doubted by the opinion in this case. Justice Strong in the State Freight Tax case, 15 Wall, 227-8, sustains this position thus: "We concede," he says, "the right of the owners of artificial highways, whether such owners be the State, or grantees of franchises from the State, to exact what they please for the use of their ways."

We submit that it will be by virtue of no such equivocal words as "rules and regulations," that the railroad company will be held to have surrendered the vital principle of their enterprise and the management of their own business.

The Act of Congress of July 31, 1861, authorized commercial intercourses "to be regulated and carried on" in pursuance of *rules and regulations* prescribed by the Secretary of the Treasury, and he imposed a tax of four cents a pound on cotton. The United States had a perfect right to tax all cotton, as it was only the property and the only valuable product of those in rebellion.

This Court decided in Hamilton vs Dillon, that the Secretary was authorized by the act to impose this tax. And this decision is referred to by the Judge below as sustaining the interpretation he gives to the words "rules and regulations."

If the decision had been that the act authorized the Secretary of the Treasury to fix the compensation that should be received for the cotton, the case would have been more in point. Justice Bradley, in pronouncing the opinion of the Court, says: "It is conceded that in many cases the power to make *rules and regulations* on a particular subject is a limited power, having respect to mode and form and time and circumstances, and not to substance. But it also must be conceded that in other cases the power is much more extensive and substantial."

Let me ask in what possible case the power to make "rules and regulations" would be held by the Court to be "limited to mode and form and time and circumstances," if not when a more unlimited construction of the phrase would have the effect of wresting from the owners their very property, for tolls are their property—all is valueless when they are taken from them.

Justice Bradley, as quoted by the Judge below, further says: "Thus in the Constitution, the several powers to *regulate* commerce; to establish a uniform rule of naturalization; to make all needful *rules and regulations* respecting the Territories or other property belonging to the United States, are understood to give

plenary control over those subjects." All of which commends itself to good judgment. But to have made the decision relied upon, authority, the Supreme Court must have held that under the right to *regulate* commerce, Congress had the right to fix the fares and freight of vessels which are the property of our citizens, and that under the right to make rules and regulations respecting the territory of the United States, Congress had the right to fix the compensation that citizens must take for their homesteads. The words of the Constitution : "Territories, or other property of the United States," suggests the true principle that the power to make "rules and regulations," in the language of Justice Bradley, has "respect to mode and form and time and circumstance, and not to substance," unless the party who is to make the rules and regulations "has control over, or property in that which is to be regulated." Those words do not confer a property control. And yet this case at bar decides (for that is the point of the decision) that because the Burlington & Missouri Railroad Company, when so requested, consented that it, the company, should be subject to such rules and regulations as the Legislature might enact; that the company then and there surrendered to the Legislature their entire right to control the profitable use of their property.

The proposition "that corporations are entirely the creation of law and therefore absolutely subject to the law," meaning subject to any enactment the Legislature may make, has become frequent if not popular, and has been resorted to for the purpose of undermining the vested rights of corporations. It is enough to say that the proposition has in it more harmony of words than of wisdom, and more of sound than of sense. Several citizens, associated as corporators have the same right as citizens associated as co partners, excepting that the former have succession, freedom from individal liability and a subjection to the Judiciary for the non-use or misuse of the franchise entrusted to them; their rights of property subject to the public use to which they have agreed that property shall be devoted, are the same as those of partners. No liberties are to be taken with rights or with property because they are those of corporations.

Natural persons can accept and use the State's franchises as well as corporations. No greater freedom is to be used with the rights of property of artificial than with those of natural persons. In Bank vs. Edgarton, 30 Vt., 182, the Court says: "There is

nothing in the right of constructing a railroad, and taking charges for its use which is necessarily of a corporate character or which might not with perfect propriety belong to or be exercised by natural persons."

In Beardsley vs. Ontario Bank, 31 Barbour, 625, Mr. Justice Allen, of the Court of Appeals, says: "Carriage of persons and property by railway is a business open to all who can acquire title to the railway and construct and equip the road, and the fact that a railroad is deemed to be so far for public purposes as to justify the delegation of this right of acquiring property upon making just compensation to the owner without his consent does not affect the character of the property which a railroad company may acquire."

In Hall vs. The Sullivan Railroad, 22 Law Reporter, 138, Mr. Justice Curtis says: "But the franchise to build, own, and manage a railroad and to take tolls thereon are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. Coe vs. Columbia, Piqua & Ind. L. R. Co., 10th Ohio St. 372, 2 Redfield on Railway 517, 570.

If the stipulation of the Burlington & Missouri Railroad Company, that it should be subject to the "rules and regulations" of the Legislature, would give the State the right to regulate the fares and freight, then we submit that the State being the mere trustee of the General Government and entrusted only with the duty of selecting the Company that should receive the lands, had no right to exact the condition that the Company receiving the lands should in their fares and freight be subject to the State.

The General Government granted the lands to Iowa that the State should, as expressed in the grant, appropriate them for the exclusive purpose of aiding in constructing and maintaining a railroad that should be a military and post road, from the Mississippi to the Missouri River. The State was bound to fulfil the trust because it agreed so to do, and because it was to be benefitted by the improvement.

When the General Government gave her lands, it did so because it adjudged that the lands were necessary to build the road. That was the only use for all the lands. Iowa had no sovereign right over the lands. The State was a mere trustee of the lands, and yet the State grasped the whole of them or the fruits, the

product of the whole of them. If her claim set up be good, the State, by the stipulation, exacted and secured the unrestrained control of the tolls—that is, all of property there is in her roads.

The State had as good a right to exact a condition that the railroad company accepting the grant should pay a dollar an acre for the land, as to claim that the Company should subject the compensation of the Company to the legislative will.

The General Government not only had the right to impose on the State arbitrarily the condition that the land should be so devoted, but the General Government had an interest that the road as a military and post road should not be subjected to legislative caprice in a matter that affected its prosperity and even existence. The condition imposed by the State is void.

Again: the Burlington & Missouri Railroad Company in accepting the grant of land only stipulated that they would be subject to such rules and regulations as were not inconsistent with the grant of the lands by the General Government to the State of Iowa.

A regulation which required the company to surrender the right to the control of the use of their property is clearly inconsistent with the grant by the General Government to Iowa, for that grant expressly provides that the only consideration that shall be exacted for land shall be by the construction of the road.

The demand for anything more from the company is clearly in direct violation of the terms of the grant of the land by the United States to Iowa.

The State of Iowa may, under the right to make rules and regulations, consistently exercise a police over the road, but may not, we submit, assume to fix the fares and freights of the company.

This ends the consideration of the case so far as the grounds taken by the judge below are concerned. But the answer sets up some other grounds in justification of the act of Iowa of 1874, fixing fares and freights which we will consider.

VI. The fact that the Constitution of Iowa adopted March 5, 1857, reserved the power to "amend or repeal all laws for the organization or creation of corporations," and that the charter of the Burlington and Missouri Railroad Company was afterwards amended, does not, as the answer claims, confer on the State any right to regulate the fares and freights of that company.

The Constitution of Iowa of May 18, 1846, under which the Burlington and Missouri Railroad Company has its charter, reserves no power to amend or repeal charters created under it. Code of 1851, p. 554. The Constitution of March 7, 1857, reserves the power to amend or repeal "all laws for the organization or creation of corporations."

This provision of the new constitution is prospective and, of course, does not affect the charter of the Burlington and Missouri Railroad Company, and does not assume to affect any amendments to that charter, as it only reserves the right to amend or repeal laws for the *organization* or *creation* of corporations. The amendments certainly are not that.

The Legislature of Iowa in **1873** (Code of 1873, p. 187, section 1,090) did pass a law that articles of incorporation *thereafter* amended, might be abridged or set aside by the Legislature; but that act does not affect the Burlington and Missouri Railroad Company, because its articles of incorporation have not been amended since 1873, and if its articles of incorporation had under the general laws of the State been amended since 1873, it could hardly be claimed that this company, as all other citizens, had not the right to the benefit of the laws of Iowa, without surrendering to the State the control of the use of their property. Legislation is not to be bargained for.

The amendments that the Burlington and Missouri Railroad Company adopted to their charter referred to in the answer, as subjecting the company to the absolute control of the legislature, were these:

1. That by the original charter, their capital was limited to three millions, and their liabilities to two millions, and that on June 23d, 1869, the company so amended their charter so as to make the limit of capital twelve millions, and of liabilities eight millions. The general incorporation law of Iowa (Code of 1851, p. 109), passed under the old Constitution of 1846, and the law was not changed until 1873 (Code of 1860, p. 196), required that the original articles of incorporation should, among other things, state its limit of capital and indebtedness, and must publish it, and then provides that "No change in any of the above matters shall be valid, *unless* recorded and published as the original articles are required to be." Laws of 1851, Sec. 680, p. 110.

So the Burlington and Missouri Railroad Company had by the

law of their charter and by the law as it stood when their amendments were made, a right to advance the limit of their capital and of their indebtedness without any condition that they should thereby become subject to legislative control.

Another amendment which the Burlington and Missouri Railroad Company adopted was this: A general law of Iowa, March 12, 1864, Pamp. Laws, p. 44, and April 2, 1860, Pamp. Laws, p. 109, gave railroad companies the right to issue preferred stock with the assent of two-thirds of their stockholders. The Burlington and Missouri Railroad Company availed itself of this power by incorporating it into its charter; the answer says, by an amendment. It was clearly unnecessary to amend the charter in order to have the benefit of the law; but the amendment if made, was not a law organizing or creating a corporation, and it is only as to such laws that the constitution reserves the right to amend or repeal. The law authorizing the issue of preferred stock was a general law of Iowa, imposing no condition, and the Burlington and Missouri Railroad Company avail themselves of it.

Another amendment stated in the answer is, that the original articles of incorporation of the Burlington & Missouri Railroad Company authorized the construction of the railroad to only one point on the Missouri River, and that by the amendment adopted June 23, 1869, it was authorized to build the road to more than one point, and that in fact under the original charter, the road was built to Plattsmouth, on the Missouri River, and that then, under the amendment, it was constructed to Hamburg, another point on the Missouri River.

The answer to all this is, that the general corporation act of Iowa does not require that the articles of incorporation should state the termini of the contemplated railroad, otherwise than by requiring them to state "the general nature of the business to be transacted," and there is, therefore, no binding force when the termini are named to hold the company strictly to them. The articles of incorporation, however, do not mention any one point, but say, Article 10, "from Burlington to the *most* eligible point on the Missouri River and by the most eligible routes" The point at Plattsmouth was not the most eligible, and the road was constructed to Hamburg. By the law of June 25, 1855, Code of 1860, p. 221, it is enacted that any railroad company shall have the power to join their railroads, constructed in the State or

out of it, "at such point in the State line as may be mutually agreed upon by said companies." This would seem to give the Burlington & Missouri Railroad Company the right to go to what point on Missouri River they pleased, and they joined the continuous line at Hamburg. The amendment is not a law for the organization or creation of a corporation, and is, therefore, in no manner affected by the new Constitution, and there is no law imposing any condition on the company by reason of the adoption of the amendment.

VII. The branch roads, incorporated under the new Constitution and aided in their construction by taxes, which the companies accepted, under the law of Iowa, which provided, that the railroad companies accepting such aid should be subject to such rates of tariff for transportation as the General Assembly might enact, are not subject to the law of March 23, 1874, as to fares and freights.

1. The fact that these charters are under the new Constitution, which reserves the power to amend or repeal charters, does not render the companies subject to the laws of 1874, fixing rates.

Charters having been held to be contracts, the reservations of the power to amend or repeal was introduced, in this and many other constitutions, to preserve the power of legislation from being limited, but the reservation conferred no new or additional legislative power. The Legislature, acting under a Constitution containing the reservation, has no greater right to impair the use or value of the property of a corporation than that of citizens generally. If the Legislature repeals the charter, the property remains that of the company or of the corporators. The Legislature can not take it. And as they cannot, by repealing the charter, take either the property or the use of the property of the corporators, they certainly cannot do so under the power to amend. The utmost power of the Legislature that any one can claim is that of withdrawing its grant to its citizens to do a railroad business under a corporate name and to receive tolls. No one will claim that while the franchise is not withdrawn, the Legislature can take the tolls, and yet the right to the unrestrained control of the tolls is the right to take them. No one will say in terms that the Legislature has the right to enact that the people shall, in time of peace, ride free, and yet the right of sovereign control of tolls is the right so to say.

When the charter is repealed, the corporators will own the property as tenants in common.

Bawn et al. vs. Robertson, 18 Howard, 480.

The State takes the corporate franchises, but it can't take the corporate property. It can't take more than it gave. All that the State did not give is as inviolate as the rights or property of other citizens. The claim of the Legislature is not only that it can recall the franchise, but can take the property—a right to control is a right to take, when it is the sovereign right; a right to take tolls is a right to take the property, for that is all of it.

The charter of these branch roads fixed no rate of charges, and it is proposed, under the reserved power of the State, to amend charters by inserting a rate of charges. This is saying that the Legislature, while it cannot take the corporate property by or after a repeal of charter, may, by amendment, subject the use of the property to its uncontrolled, unrestrained sovereign will.

That would be taking private property without compensation.

Justice Miller, in referring to a state of facts where lands were injured by back water, in effect says: that it would be a curious result if, while the Government cannot convert real estate to the uses of the public without compensation, yet it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense, it is not taken for public use.

Pumpelly vs. Green Bay Comp'y, 13 Wallace, 166.

If the Legislature, under the power to amend, possesses this extraordinary power over the property of those who have invested in corporations, it should be known, and such investments will cease. This power, too, devolves upon sovereign Legislatures a new business, that of fixing the compensation of all the water, gas, insurance and manufacturing companies of the land.

The reservation in the Constitution of the power to amend or repeal, which only has the effect of excluding the conclusion, gives the Legislature no more control over the property or the use of the property of a corporation than the Legislature has over the property and the use of the property of individuals.

Under the laws of Massachusetts, acts of incorporation are "at all times subject to amendment, alteration or repeal" Yet Chief Justice Shaw says: "It seems to us that the power should have

some limit though it is difficult to define it. Perhaps the true rule is this, that when, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the property granted."

Commonwealth vs. Essex County, 13 Gray, p. 253.

Judge Story, in Allen vs. McKeon, 1 Sumner, 276, in speaking of the alteration of the charter of a college, referring to the reserved power of the Legislature, says : " Its authority is confined to the enlarging, annulling or restraining of the *powers* of the corporation. It cannot intermeddle with its *property*."

In Millin vs. State, 15 Wall, 498, Justice Clifford says: "Power to legislature founded on such reservations in a charter to a private corporation is certainly not without limit, and it may be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such charter, and which by a legitimate use of the power granted have become vested in the corporation.

State vs A. James, 4 Missouri, 570.
Millin vs. N. Y. & Erie R. R., 21 Barbour, 513.
Commonwealth vs. Canal Co., 66 Penn, 41.
Zabriskie vs. Railroad Company, 3 C E. Green 180.
Railroad vs Teazie, 39 Maine, 587.
City of Erie vs Erie Canal Co., 59 Penn., 174.

If it be said that railroad companies have no just complaint, that the legislature by amendment of their charter fix the rate of tolls, because they built their road knowing that the right to amend was reserved, we answer that the company knew that the reservation of the right to amend did not annul the laws of the land ; it did not subject private property to be taken, or the profitable use of it to be taken, or the business management of it to be taken without just compensation ; they knew that the reservation of the right to amend did not annul those principles of justice which are universal, and which forbid that either the property or the labor of men should be subject to any uncontrolled and unrestrained sovereign will.

The reservation of the new constitution then confers no new but only preserves the then existing powers of legislation. And either with or without the reservation is the capital, personal service, and liability for damages of individual or associated citizens subject to any sovereign discretion.

Neither does the fact that the branch roads *were aided in their construction by taxations*, and that they accepted the contribution under the condition that they should be subject to rates of tariff to be fixed by the legislature, render those roads subject to the act of 1874.

Those companies are only subject to a tariff of rates that is reasonable, and the law of 1874 fixes an *unreasonable* tariff of rates.

Such, we submit, is the meaning of the stipulation made by the companies on accepting aid from taxation. To hold that in consideration of receiving a modicum of tax money the companies surrendered their right to demand even against the Legislature a reasonable compensation would be to say that they surrendered their road and much more to secure a mere fraction of what the road cost. The Court will not hold that either party so understood the stipulation, and unless they did so understand it cannot be so construed.

The stipulation gives the Legislature the power to supervise, but not to destroy. In Whiting vs. Sheboygan Railroad Company, 25 Wis., 167 and 201, the Court says in reference to this power: "The true intent and object of the power is that the Legislature shall be able to protect the rights and interests of the people, but not that it shall arbitrarily or unnecessarily impair the rights and franchises of the Company or destroy the property of its stockholders, and to this the Court says, 'the good faith of the State is pledged.'"

The Courts have jurisdiction to determine the reasonableness of the tariff of prices fixed by the Legislature, because the Legislature assumes to be acting under a contract with these roads, and the Court has the same right to see that this contract is properly executed as it has to see that a contract between individuals is so executed. And again, the question whether prices are reasonable is properly a judicial question, and if the Legislature under a contract assumes the province of the judiciary their action is subject to the same review. And further, the tariff of prices fixed by the Legislature stands in the place of an ordinance or by-law, and their reasonableness is a question for the courts.

State vs. Overton, 4 Zab. 435.

The Court is not expected to go into the minutiae of deciding whether the tariff of freight for a ton of merchandise is too much

or too little, but if it is clear that the tariff is founded on an illogical or unreasonable principle, we submit that they will annul it.

The principle adopted by the Legislature of Iowa is that when the *gross* earnings of a road per mile per annum are $4,000 or more, the Company is of Class A, and may only charge for transportation ninety per cent. of the tariff fixed; if the gross earnings are $3,000 or any sum less than $4,000, the Company is of Class B, and may charge five per cent. in addition to the tariff fixed; if the gross earnings are less than $3,000, the Company is of Class C, and may charge twenty per cent. in addition to the tariff fixed. And for passengers Class A may only charge three cents per mile, Class B, three and one-half cents; Class C, four cents.

The *gross* earnings of a railway company is clearly no more of a measure of what it is reasonable to charge than is the fact that the soil the road is built on is clay and not gravel.

A railroad company may receive in *gross*, four thousand dollars per mile per year, and lose a thousand dollars, or net a thousand dollars per mile; it depends on the grades, on the number of engines required on the curves, on the wear and tear, and on the cost of the road. It is only the *net* earnings of a road that contribute anything as compensation for capital, service and risk—and the rule adopted has no reference to net earnings—it is the same to a road which with four thousand dollars gross earnings sinks one thousand as to the road which with the same gross earnings by reason of the cheapness of the road, its easy grades and favorable locality, can realize a profit of thousands This is the Procrustean bed, upon which the railroad companies of Iowa are laid.

The rule of the Legislature is as unreasonable as would be a law imposing a poll tax of one hundred dollars on a citizen, the amount of whose business was four thousand dollars a month, and seventy dollars on one the amount of whose business was three thousand dollars a month, while the former might have no income and the latter thirty thousand dollars a year. This, though unreasonable, might be done under the taxing power, but no such irrational rule can be adopted where under a contract the legislature are fixing a reasonable tariff of rates.

Again: A road, the gross earnings of which are only three thousand dollars per mile per year, may by this tariff, charge thirty per cent. more than the road, the gross earnings of which

are four thousand dollars, and yet the net earnings of the former are as likely to be as not to be, more than those of the latter.

Again: By this rule of tariff, a road which has a gross earning of $3,999.99, may charge 15 per cent more than the road the gross earnings of which are one cent more.

If we assume that the tariff fixed for railroads of Class C, is not too high, it is clear the tariff fixed for Class A, being 30 per cent. less, without any logical reason being given therefor, is ruinous. The value of railroad property is only and entirely in its *net* earnings; this reduction of 30 per cent. is made from the net earnings, if any, until they are exhausted, and then it is a draft upon the capital. And this is called "compensation." It would be no more a taking of private property without compensation for the Legislature of Iowa to confiscate thirty miles of every one hundred miles of these railroads, than it is for them to take 30 per cent. from the income of a road for no other reason than that its gross earnings are four thousand dollars per mile per year, instead of only three thousand dollars per year. That fact constitutes no apology for the discrimination, unless it appears that the cost of building and running the two classes of roads is the same, and then it would be a poor apology for the benefit conferred by the transportation upon those who pay the freight is about the same.

Establishing a rule of charges that has no reference to the value of the service rendered to the cost of rendering the service, or to the question whether it will yield a compensating profit to the company is an invasion of the vested rights of property; whether the rule does or does not bankrupt the company, is a matter of chance; that consideration does not enter into the reason of the rule. It is taking of private property without just compensation. No compensation is *secured*, and taking the use of property is taking the property, for that is all there is of it. The Legislature may, under the right of eminent domain, condemn to public use any one of these railways, but the Court would not permit the railway to be taken on any such doubtful and unreasonable compensation as that proposed by this rule of tariff—and, if that is so, the Court should not suffer the compensation for the use of the railway to be fixed by any such rule.

What the examination of this tariff of prices clearly shows, the bill plainly avers. It says the rates heretofore charged have been

barely adequate, under careful management, to keep the road in condition to do the business and pay reasonable dividends, and the answer does not deny the averment. It is a short argument to show that with roads so circumstanced a 30 per cent. reduction in income destroys to the corporators the value of the property.

The sheer, naked arbitrariness of the law of 1874, as applied to the rights of property, shows it to be, not only unreasonable, and therefore void, but also to be contrary to natural justice and therefore void.

The Legislature may, under the stipulation with those branch roads, fix the rates for freight and passengers, but it must be under a rule that is reasonable and that gives compensation, and not by such a law as that in question.

VIII. The law of 1874, fixing one limit of compensation for a railroad company, the gross earnings of whose road are $2,999, or less, per mile per year, and another limit for a company whose gross earnings are $4,000 per mile per annum (and making the latter 30 per cent. less than the former), is in violation of the Constitution of Iowa which provides, Act 1, Sec. 6, that all "laws of a general nature shall have a uniform operation"

This law of 1874 is a law of "a general nature," or it is clearly unconstitutional; for Act 8, Sec. 1, expressly declares that "No corporation shall be created by special laws but the General Assembly shall provide by *general laws* for the organization of corporations hereafter to be created" And by the 12th sec. of the same article it is only *such* "laws for th organization or creation of corporations" that the General Assembly reserved the right to "amend or repeal."

The Legislature went to the full limit of its Constitutional power when it assumed by the act of 1874 to legislate for railroad companies as separated from other corporations—for the legislation is organic, the law becomes a part of every charter and relates to the income, the thing for which, alone, as private property, railway corporations were created.

But the Legislature claim that the law of 1874 is a general law, because it applies to railroads as a class; and that they do not violate the Constitution by restricting the profits of those of their citizens whose capital are invested in railroads, while the profits of those who invest in steamboats, express, hotel or gas corporations are unrestricted.

It may be that the Constitution of Iowa, requiring that laws affecting corporations shall be general, is satisfied by legislating separately as to different classes of corporations. But under the Constitution of Iowa, what justification is there for vitally different and diverse enactments as to the members of the same class of corporations? The Constitution says laws affecting corporations must be general. The Legislature says the law in question is general, because it relates to railways as a class. The Constitution says all laws of a general nature must have a "uniform operation" And the Legislature is silent, for no one can pretend the law of 1874 is "uniform in its operations" as to the class to which it applies, for under it the limit of the compensation of a railroad the gross earnings of which are $4,000 is thirty per cent. less than that of a road the gross earnings of which are any less than $3,000, though the latter may make large profits and the former not realize a farthing The law of 1874, in as much as it does not equally affect all railroads, but is partial and special, violates the provision of the Constitution, prohibiting "special" and requiring "general laws" for the organization of corporations. Act. 8, Sec. 12.

And the law of 1874, which must be held to be a general law or be void, violates also that provision of the Constitution which requires "that all laws of a general nature shall have a uniform operation." Act. 1, Sec. 5.

IX. The law of 1874 is in violation of the Constitution of the United States in that it assumes to regulate commerce among the several States.

The Court will take notice, that the Burlington & Missouri Railroad is a section of a trunk route extensively used for inter-State commerce The general laws of Iowa recognize their roads running East and West as sections of national routes.

Sec. 1,276, 1,277 and 1,278,Code of 1873, p. 233, provides that a railway company which has constructed a railroad to connect with one in any adjoining State at the boundary of Iowa shall have power to make contracts with the corporation of the adjoining State for the transportation of passengers and freight, and for the use of their railway by the foreign corporation. And that a corporation of Iowa may extend its road into another State under such regulations as may be subscribed by the laws of such State,

and that the assets of the company shall be administered the same as if the railway was in Iowa, and that corporations operating railways under the foregoing provision shall be subject to all duties and liabilities as fully as if named in the act.

The bill of complaint states that the roads of the complainants and of the Burlington & Missouri Railroad Company are operated by the complainants as one road, from Chicago to the Missouri River, and that more than three-fourths of the passengers and freight that are carried over the Burlington & Missouri Railroad and its branches consists of passengers and freight taken up outside of Iowa and carried, as to freight, without breaking bulk, into Iowa, and taken up in Iowa and distributed to the commercial emporiums of the Union. This statement the answer of the last page refers to, and by not denying admits.

The law of 1874 in fixing the tariff of charges, in its penalties and in all its provisions applies as well to inter-State commerce as to that confined to the boundaries of Iowa. Session Laws, 1874, p. 61.

The law in terms applies as well to corporations doing business in the State as to those there organized. Section 1.

In determining by its gross earnings to what class the railroad belongs, the fares and freights resulting from inter State commerce are to be included. Section 1.

The tariff of rates applies not to merchandise taken up and discharged in the State, but in terms to all transported "over any line of railroad within this State." Section 3. The detailed schedule makes no distinction. Section 3.

The prohibition is against charging more for any merchandise "over a line of railroad" of the several classes. Section 4. The classification of freight applies to all freight. Section 5.

All railroad corporations doing business in the State are required to post the schedule and classification. Section 6. All railroad corporations operating a railroad in the State are required every January under oath to file a statement of the gross receipts, (not the receipts of transportation of passengers and freight taken up and discharged in Iowa), but of the gross receipts of its entire road within the State. Section 7.

It cannot be disputed that the act extends to inter-State commerce. The answer does not deny that the act does so extend, but admits it, by answering (on last page) that it is not intended

to sue the complainants for penalties on account of their charges for passengers and freight which were taken up in the State to be transported out of it, or taken up out of the State to be transported into it.

The Act of 1874 assumes to regulate inter-State commerce and is void.

Constitution of United States, Act. I, Sec. 8: "The Congress shall have power to regulate commerce with foreign nations and among the several States."

Gibbon vs. Ogden, 9 Wheat, p. 1.

"The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State, but it does not extend to a commerce that is completely internal. "The power is *exclusively* vested in Congress. No part of it can be exercised by a State."

The Court is to pass on the question whether the law of a State assuming to regulate commerce among the States, is or is not constitutional? It is entirely immaterial whether the Attorney-General of the State intends to enforce its penalties as to inter-State commerce or does not so intend.

It may be argued that the same words in a law may be constitutional and valid as applied to our subject, and unconstitutional and void as applied to another subject. But that cannot be true, because a law must be a rule fixed and prescribed, so as to be known that it may be obeyed. It is not the province of a Court to amend, enlarge, or contract a law so as to render it constitutional. The Court is to administer the law if it be valid, and if not valid, the Court is so to decide and leave it to the Legislature to amend It is thus that the law will be prescribed and known and the co-ordinate branches of Government will be limited to their proper functions.

In an act of several sections part may be valid and part void for unconstitutionality, but the same words cannot be both void and valid, constitutional and unconstitutional, as they are applied to different subjects. No such power of distributive application is conferred on those who administer the law.

The Constitution of the United States says, "that cruel and unusual punishments shall not be inflicted." Should a law of Congress enact that all persons convicted on indictment of crimes in-

volving violence should be capitally executed, would any one hold that such a law as applied to any subject was constitutional? If it stands, the courts are to administer it, but clearly, not in whole, and if in part, how is the citizen to know the limits and boundaries, the judgment of the Court will fix? No; the law must be prescribed by the Legislature and not be carved out by the Court when the case arises. That rule would invade personal security and liberty.

This law of 1874 undertakes, in the same words, to fix a tariff of charges for passengers and freight taken up and discharged in the State, and for passengers and freight taken up out or discharged out of the State. The act regulates inter-State commerce and is void. The fact that it regulates State commerce as well does not made it valid.

But, if the same words of a law can be held valid when they can be applied by the Court to one subject, and void when they can be applied by the Court to another, no one will hold such a law valid if it cannot be so separately applied.

This law so mingles in every provision State and inter-State commerce, that it cannot be applied to State commerce without affecting, at the same time and in the same manner, inter-State commerce. It assumes to regulate all the charges on all the traffic on a through route on which two-thirds of the business is inter-State commerce. The schedule of charges it enacts, in terms and in fact, applies equally to both classes of business. Whether a railroad company is liable to the penalties of the law, depends, by the act, upon the amount of the company's gross earnings, and those gross earnings are made up of inter-State as well as of State commerce, more largely of the former than of the latter. The law cannot be separately applied. It cannot be applied to State commerce without affecting inter-State. And the summary answers of the Judge below, that the Attorney General only intends to apply the law to State commerce, falls. The Attorney-General cannot so apply the law.

It is clear that the liability of the railroad companies to the penalties for over-charges on the business *within* the State, depends on the amount of the gross earnings the companies receive from inter-State commerce. Thus, a company belonging to Class A is sued for overcharging on business within the State, but, if the gross earnings of the company had been only those of Class

C, or anything less than $3,000 per mile per year, the price charged would not have been an over-charge, for Class C may charge 30 per cent. more than A. And the gross income of Class A is more than $3000 because of its inter-State commerce. So that Class A is subjected to a penalty for over-charging on freights taken up and discharged within the State only because it has increased its gross earnings by doing inter-State commerce. This is in effect a penalty for engaging in inter-State commerce. That is the most objectionable regulation of commerce among the States.

If the State of Iowa wishes to fix a tariff of prices on these branch roads for the transportation of passengers and freight taken up and discharged within the State, and not to affect the commerce with other States, it must so frame its laws. And then in regulating the prices and in fixing penalties it must so form its laws that the price a company may charge, and the penalties it incurs do not depend on the earnings it obtains from inter-State commerce.

It looks as if this law was devised with the purpose of suffering local roads, the gross earnings of which are comparatively small, to receive large compensation, and to exact from the national roads whose gross earnings are of course considerable, a service to the people of the State without adequate compensation. A difference in the tariff of charges between railroads in the same State of thirty per cent is a large difference. It is a very unusual difference, and perhaps not an accidental one.

Fred'k. I. Fording

SUPREME COURT

OF THE

UNITED STATES.

Appeal from United States Circuit Court, District of Iowa.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Complainants,

vs.

THE ATTORNEY GENERAL OF IOWA,
And Others.

ARGUMENT FOR THE DEFENDANTS.

M. E. CUTTS, Attorney General of Iowa, and
W. H. SEEVERS, Counsel for Defendants.

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STATEMENT OF THE CASE.

In March, A. D. 1874, the General Assembly of Iowa passed an act entitled "An Act to establish reasonable maximum rates of charges for the transportation of freights and passengers on the different Railroads of the State."

This act classifies all of the railroads in the State, according to their gross annual earnings per mile, and substantially provides that roads earning annually $4,000 and over, per mile, (class A), shall not charge more than ninety per cent. of the tariff rates established in the schedule, set out in the act; that roads earning annually $3,000, and less than $4,000 per mile, (class B), shall not charge more than five per cent. above said tariff rates; and that all roads earning less than $3,000 per mile annually, (class C), shall not charge more than twenty per cent. above said tariff rates; and that roads in class A shall not charge for each passenger more than three cents per mile, roads in class B

not more than three and a half cents, and roads in class C not more than four cents per mile for each passenger.

This suit was brought by the Chicago, Burlington & Quincy Railroad Company, of Illinois, as the lessee in perpetuity, under alleged legislative authority, of the Burlington and Missouri River Railroad Company, to enjoin suits by the Attorney General of the State for the enforcement of the provisions of this law.

The action is based upon the alleged ground that the law is in conflict with the Constitution of the United States, in that it impairs the obligation of a contract, and is also a regulation of inter-state commerce; that it is also repugnant to the State Constitution of Iowa, for the reason that it does not affect all railroads alike, and is therefore not of uniform operation, and for the further reason that it conflicts with Section 6, of the Bill of Rights.

The formal allegation is made that the Attorney-General threatens and is about to commence various suits, to enforce the provisions of said act, which will cause a great multiplicity of suits, and result in irreparable injury to complainant.

The answer, so far as material to the present purpose, admits most of the allegations of the bill, but denies that the B. & M. R. R. Co., either by the charter or the laws of Iowa, had the exclusive right and power to fix its rates of fare, and denies that any attempt is to be made to enforce the law, so far as regards inter-state commerce.

It is averred in the answer, that if the B. & M. R. R. Co. ever did have such exclusive right, it yielded such right by its acceptance of the land grant, in A. D. 1856, under the conditions stated in the act granting said lands. That since the original charter was granted, and after the adoption of the new constitution of Iowa, in A. D. 1857, said charter has been amended in many material respects, and that by the acceptance of such amendments, the charter became subject to amendment or repeal by the General Assembly, under the provision of said constitution conferring that power and right upon the General Assembly; and that it especially applies to the Red Oak branch, which was constructed by virtue of an amendment to the charter, made in A. D. 1869.

That as to the other branch roads, they were constructed by the aid of taxes levied and collected in the various townships and cities through which they were constructed, and were therefore subject to legislative regulation by express provision of the statute authorizing the levying of such taxes.

The cause was heard on bill, answer, exhibits and proofs, and at the hearing the injunction was refused, and the bill dismissed. From this decree, complainants appeal.

I.

A statute will not be held invalid by reason of any repugnancy to the constitution, unless such repugnancy is clear and undoubted. A conflict with some specified clause of the constitution must be shown to exist, beyond all reasonable doubt, or the law will be sustained.

A legislative enactment will not be declared void by the courts, unless its unconstitutionality can be clearly shown and distinctly pointed out, and it does not devolve upon those seeking to uphold a particular statute, to show its enactment to bewithin the scope of the exercise of legitimate legislative powers. The burden is cast upon those who impugn its validity, to show wherein it is violative of constitutional restrictions; they must present to the attention of the court the particular clause or provision of the written constitution that has been violated; and it will not be sufficient to show that it violates the general spirit of our institutions, or that it is wrong and unjust, or that it is an abuse of power, or is inexpedient or impolitic, or does violence to natural, social or political rights; since a statute may in fact possess any one or all of these characteristics, and still be in entire accord with the provisions of the constitution.

All legislative power is inherent in the people in their sovereign capacity, and this power has been delegated in a complete and unreserved manner to the legislature of the State, except only as such delegation has been restricted or limited by provisions of the state or federal constitution; and it is not, therefore, necessary to show, to the end that a particular statute may be pronounced valid, that the power and right to enact such statute has been delegated to the legislature; on the contrary, it will without hesitation be declared valid, unless it can be clearly shown that such power and right have not been delegated. So frequently, indeed, has this principle been recognized and applied that it has become axiomatic in its character.

In *R. R. Co. vs. Otoe*, 16 Wall., 667, 673, it is said by Strong, J., that: "The legislature of a State may exercise all powers which are properly legislative unless they are forbidden by the State or national constitution. This is a principle that has never been called in question."

It was said by Swayne, J., in delivering the opinion of the

court in *Township of Pine Grove vs. Talcott*, 19 Wall., 666 673 that: "It is said the act is in conflict with the constitution of the State. It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground unless the repugnancy to the constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. *The particular clause of the constitution must be specified*, and the act admit of no reasonable construction in harmony with its meaning."

* * * * * *

"It does not belong to courts to interpolate constitutional restrictions. Our duty is to apply the law, not to make it. *All power may be abused when no safeguards are provided*; the remedy in such cases lies with the people, and not with the judiciary."

In *Thorpe vs. R. & B. R. R. Co.*, 27 Vt., 140, the following language was used by Redfield, C. J.: "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation that resides in the British parliament, except where they are restrained by written constitutions."

It was said by Black, C. J., in *Sharpless vs. Mayor*, 21 Penna. 161, that: "I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments based on general principles outside of the constitution must be addressed to the people and not to us."

In *Tyler vs. People*, 8 Mich., 331, it is said by the court that: "In Sears *vs.* Cottrel, 5 Mich., 251, we stated, in substance, if not in words, that to warrant us in declaring a statute unconstitutional, we should be able to lay our fingers on the part of the constitution violated, and that the infraction should be clear and free from reasonble doubt."

In *McMillan vs. Lee County*, 6 *Iowa*, 391, it was said by Wright, C. J., that: "The true inquiry, however is, whether the exercise of the power is inhibited. In ascertaining the power of the Legislature under the Constitution, we look, not to what the instrument authorizes to be done, but to what is prohibited." See also, *Cooley on Cons. Lim.* 164—169, and cases cited, and *Sedg. on Stat.* and *Cons. Law* 155, and cases there cited.

If the Constitution of the State of Iowa contained a clause expressly granting to the Legislature the power to regulate the rates of fare to be charged by railroad companies for transporting passengers and freight within the State, it

would scarcely be contended that the enactment of the Statute under consideration, was not a legitimate and proper exercise of that power. But if, as shown by the authorities before cited, all legislative power has been delegated or granted by the people to the Legislature, except wherein it has been expressly reserved or restricted, then such delegation or grant of general power just as certainly and surely conferred upon the Legislature the power to enact this Statute, as would have been the case, had such special provision been incorporated into the Constitution.

If a constitution could be imagined to exist, which in express terms particularly named and specified all objects and subjects of legislation, and expressly conferred upon the Legislature plenary powers to legislate upon and concerning each and all of said objects and subjects, still, under such a constitution, the Legislature would have over such subjects and objects no greater nor more comprehensive powers than it would have, if the constitution had contained no such particular or special provisions; and this for the reason, that a general grant of legislative power over all matters, necessarily includes a grant of legislative power over each particular matter.

The complainant in this case must satisfy the court that this statute is inhibited by, and directly contravenes some portions of the written constitution. That it restrains and restricts to a great extent the use, control and enjoyment of private and individual property by the owner, is by no means sufficient; on the contrary, it must be made to appear that the Legislature were expressly prohibited from the enactment of such a measure, to justify the court in pronouncing it to be invalid.

"*All doubts as to the constitutionality of an enactment will be resolved in favor of its validity*, and it will be upheld unless clearly unconstitutional." *Cum. & Ohio R. R. Co. vs. Barren County*, 10 *Bush* 604.

II.

The Statute does not impair the obligation of the contract contained in the Charter of the Burlington & Missouri River Railroad Co.

It is contened that the law impairs the obligation of the charter granted by the State to the B. & M. R. R. Co., and is therefore in violation of the federal constitution.

The Burlington and Missouri Railroad Company was incorporated under the general incorporation law of the State, and resort must therefore be had to that law for the

purpose of ascertaining the terms of the contract between the State and the Company. And unless it shall be found that there is in the charter, a provision granting to the Company the exclusive right and power to fix its rates of tolls, then the statute in question does not impair the obligation of the contract.

1. In construing a charter granted by the State to a corporation, it is to be taken most strongly in favor of the State; and not only is this so in relation to the grant of a charter, but is likewise so in relation to all grants of the State; and this whether the grant is or is not based upon a valuable consideration. Thus in *Rice vs. Railroad Co.*, I *Black* 358 380, it is said that: "Whenever privileges are granted to a corporation and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public; and nothing passes but what is granted in clear and explicit terms." The same language was used by Clifford, J., in *Holyoke vs. Lyman*, 15 *Wall.* 500. In *Erie & N. W. R. R. Co. vs. Casey*, 26 Penns. St. 306, the court says: "Contracts between the State and corporate bodies cannot be implied from anything but plain words; and those words must be spoken by the General Assembly, and enrolled in solemn form among its acts."

It is said in *Penns. R. R. Co. vs. Canal Comrs.*, 21 *Penns. St.* 22, that: "But corporate powers can never be created by implication, nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words testifying the intention of the Legislature in a manner too plain to be misunderstood."

"In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference."

And in *Cleveland vs. Morton*, 6 *Cush.* (*Mass.*) 323, it was said that: "In all grants made by the Government to individuals, of rights, privileges and franchises, the words are to be taken most strongly against the grantee, contrary to the rule applicable to a grant from one individual to another. When one claims a franchise or exclusive privilege in derogation of the common rights of the public, he must prove his title thereto by a grant clearly and definitely expressed and cannot enlarge it by equivocal or doubtful provisions, or mere probable inferences."

In *Rich. R. R. Co. vs Louisa. R. R. Co.*, 13 *How.* 71-81, *Grier, J.*, in delivering the opinion of the court, said: "This act contains the grant of certain privileges by the public to a private corporation, and in a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public; and the corporation can claim nothing but what is clearly given by the act.

See also to the same effect, *Mohawk Bride Co. vs. Utica R. R. Co.*,6 *Page ch.* 565; *Com. vs. Erie & N. E. R. R. Co.* 27 *Penna.* 339; *Charles River Bridge vs. Warren Bridge*, 11 *Peters* 544; *Ohio Life Ins. Co. vs. Debolt*, 16 *How.* 435; *Minturn vs Larue*, 23 *How.* 435.

In a number of these cases it appeared that the railroad companies had given the same consideration for the grant of the charters, that is alleged to have been given by the B. & M. R. R. Co. for the grant of the charter under consideration; and yet the courts did not in any case hesitate to hold that the same rule of construction should prevail, and that the charters should be taken most strongly against the corporations claiming rights and privileges thereunder.

Without doubt the doctrine is firmly established that corporate powers can never be created by implication nor extended by construction; and that whenever a corporation asserts a chartered right or privilege, it must be able to point to some provision in the charter granting such right in unmistakably clear and explicit terms. And hence, if complainants claim that the charter of the B. & M. R. R. Co. granted to that company the *exclusive* right and power to fix the rate of tolls and fares that it should be lawful for the company to charge for transportation of freight and passengers over its road, then it is incumbent upon them to clearly point out the provisions of the charter upon which they rely for such right.

As showing how rigidly this rule has been applied in construing charters in cases where the right to charge and collect tolls and fares has been asserted, either by virtue of some provision in the charter, or as an incident or attribute to the ownership of property, the attention of the court is especially called to the following cases:

Proprietors of Canal Bridge vs. Gordon, 1 Pick, 296.
State vs. Cin. Gas Co., 18 Ohio, St. 287.
Camden & Amboy R. R. vs. Briggs, 2 Zab., 623.
Olcott vs. Banfill, 4 N. H. 545.

Perrine vs. Chesapeake & Del. Canal Co., 9 How. 184.
Wisconsin R. R. cases, 35 Wis, 423.
Proprietors of Stonebridge Canal vs. Wheely, 2 Barn., and 1 Adolph, 793.

These cases are not cited for the purpose of establishing the doctrine that railroad companies cannot charge and collect compensation for transportation of freight and passengers, except when expressly authorized so to do by their charters, but merely for the purpose of showing with what unyielding strictness courts have uniformly applied the rule that charters should be construed most strongly against the corporations, and in favor of the public; and there seems to be the greater propriety in calling the special attention of the court to them, since they are not only striking instances of the application of the rule of construction referred to, but they more or less directly involved the question of the right to collect fares and tolls.

2. Keeping in view this well recognized rule of construing the charters of corporations, it is now proposed to examine the charter of the Burlington and Missouri R. R. Co for the purpose of ascertaining whether or not there is, as claimed by complainants, any contract existing between the company and the State, to the effect that the company should have the exclusive right of fixing the rates of fares and tolls for transportation of freight and passengers over its road.

The general incorporation act of Iowa, in force at the time of the adoption of the charter in question, provided as follows:

"SEC 673. Any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of canals, railways, bridges or other works of internal improvement; *but such incorporation confers no power or privilege not possessed by natural persons* except as hereinafter provided.

674. Among the powers of such body corporate are the following:

1. To have perpetual succession;
2. To sue and be sued by its corporate name;
3. To have a common seal which it may alter at pleasure;
4. To render the interests of the stockholders transferrable;
5. To exempt the private property of its members from liability for corporate debts, except as herein otherwise declared;

6. To make contracts, acquire and transfer property, possessing the same power in such respects as private individuals now enjoy.

7. To establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs in accordance with law, and not incompatible with an honest purpose.—Code of Iowa, 1851.

It will be noticed that these sections of the law, which alone designate the powers of the corporation, expressly provide that such corporation *shall have no power or privilege not possessed by natural persons, except as otherwise provided therein.* It follows, then, that the corporation stands upon the same footing as a natural person, and must be governed by and subject to the same rules and principles as a natural person, unless it can be shown that it is "otherwise provided" by this same statute.

The only provision which, it is claimed by complainants, expressly provides otherwise, and which expressly confers upon the company the right to compensation, and the right to fix, exclusively of the legislature, its own tariff of charges, is the eighth subdivision of section 674 above quoted, viz.: "To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy" Here, it is asserted by learned counsel, is an express grant of the right to receive tolls for the transportation of pasesngers and freight, and an express grant to the corporation of the right to fix its own tariff of charges; this, however, it is submitted, is begging the whole question.

Nothing is said therein about tolls or fares, and if it can be said that the power to make contracts and to acquire and transfer property includes the power to establish rates of toll and fare, it is only by implication that such conclusion is reached. Certainly the terms used do not necessarily include the meaning attributed to them; and this will be the more manifest, when it is remembered that this provision refers not simply to railroad companies, but to any and all corporations that could be organized under this statute, for the transaction of any lawful business; including banks, insurance, manufacturing and mining companies; in fact, every corporation that could be lawfully organized, for pecuniary profit. Of course the provision, when construed in respect to a bank, would not be held to mean tolls and fares, neither would it be so held when applied to an insurance or manufacturing company; it is quite evident, therefore, that it is only by implication,

if at all, that it can, as applied to a railroad company, be held to mean and to include tolls and fares, and the right to establish the rate thereof.

But even if it be conceded that it does confer the power, as claimed, still it only gives such powers as private individuals have in respect to the same subject matters; that is, the power to make such contracts, and no other, as a private individual may make; the same power to acquire and transfer property, and do it in the same manner and to the same extent as may private individuals, engaged in the same business. In fact, there seems to have been a studied care on the part of the legislature *not to confer* upon the corporation any more extended powers than those possessed by natural persons and private individuals; the language used is, "possessing *the same powers*" as private individuals. The same powers, is synonomous with equal powers, since things that are not equal are not the same. Now, it will scarcely be contended that a private individual has not the power, independent of the statute, "to make contracts, acquire and transfer property;" and the object of this statute evidently was to give equal or the same powers in such respects to corporations. If, therefore, it can be ascertained what powers, in respect to making contracts, acquiring and transferring property, private individuals possess, it will then have been ascertained, precisely, the powers that corporations have, in respect to the same matters; for the statute provides that their powers shall be the same. It is therefore essential to ascertain the powers enjoyed by a private person, in the matters of making contracts, acquiring and transferring property, to the end that the powers of a corporation may be accurately ascertained and defined.

Now, a private person may make contracts, and may acquire and transfer property without the aid of a statute or a charter from the State, and yet his contracts, both in form and substance, may be greatly limited and restricted by statute.

A private individual, under the laws of Iowa, may call into active operation, in his behalf, the power of eminent domain, and may thereby obtain for himself the right of way for a railroad, to be constructed and operated by himself. This is so expressly provided by Section 759, Code of 1851.

Not only is this so under the statute, but in the absence of any statutory provision such would be the case.

In *Bank vs. Edgarton*, 30 Vt., 182, it is said that "the

right to build, own, manage and run a railroad, and take tolls thereon, is not of necessity of a corporate character, or dependent upon corporate rights. It may belong to and be enjoyed by natural persons." To the same effect are:

Beardsly vs. Ontario Bank, 31 Barb., 619, 625;

Coe vs. C. P. & I. R. R. Co., 10 Ohio, St. 372;

Hall vs. Sullivan Railroad, 22 Law Rep., 13.

Such natural person, in the use, ownership and operation of his road, has the power to "make contracts, acquire and transfer property." He does not possess or exercise this power, however, by virtue of any grant from the State, but by virtue of his natural right as a person; not by virtue of a contract with the State, for there is, in his case, no such contract; not by virtue of any charter from the State, for, not having been incorporated, he has no charter. And if, while so using and operating his road, and while "making contracts, and acquiring and transferring property," the legislature should enact a statute limiting him in the amount of rates that it should be lawful to charge, he could not be heard to say that such statute was invalid, in that it impaired the obligation of his contract with the State, for he has no contract; and unless he could defeat the operation of the statute in some other manner, he would be compelled to submit to its terms, and conform to its provisions.

But if a corporation, owning and operating a railroad, can defeat such a statute, upon the ground that it impairs the chartered obligations made by the State, then it is most certainly true that the corporation possesses more unlimited and greater powers than the private individual; and so of course the powers are not the same, although the statute which gives life to the corporation *expressly provides that they shall be the same.*

It is legitimate to assume that private persons own, use and operate railroads in Iowa, and we know that corporations own, use and operate them, and if the position contended for by complainant be correct, then the statute under consideration can be defeated in its operation by the corporations, while at the same time the private individuals must submit to its operation; and thus the very anomalous conclusion is reached that a corporation, the creature of statute, and which, by the law giving it life and being, is expressly limited to the possession of such powers and privileges as natural persons possess, is above and beyond the reach of the laws that limit and restrict private persons, and that such result is accomplished by the very

law that created the corporation; a very absurd consideration, to say the least of it, and one which certainly renders entirely nugatory a very wise and prudent provision of the statute.

How can it possibly be that the powers of two individuals are the same, and equal, if the powers of one can be limited and restricted by statute, while those of the other are above and beyond the reach of any such limitation or restriction? A power that cannot be limited is certainly not the same as, nor equal with, one that can be limited; and if a railroad company has the exclusive power to fix its rates of tolls and fares, and a private individual has not that power, but is subject to statutory restriction or limitation, then it is preposterous in the highest degree to affirm that both the corporation and the individual have the same and equal powers.

It is not contended on the part of respondents that under this provision a railroad company has not the power to contract for fares and tolls; not at all, but it is contended that the power of the company in this respect is the same as, is just equal to, and is coextensive with, that of a natural person; being not a whit greater nor less. The contract then between the B. & M. R. R. Co. and the State is, that whatever contract a natural person may make the railroad company may make, and whatever contract a natural person may enforce the railroad company may enforce; and to whatever extent a natural person, engaged in the same business, may be subject to legislative restriction and control, to that same extent a corporation may be restricted and controlled.

The corporation, by the adoption and acceptance of this charter, in effect, expressly stipulated with the State that it would at all times and under all circumstances consent to the same legislative control and supervision that might lawfully be exercised over a natural person. If such be not the true construction of the statute, then it has no meaning at all; and if a court can fairly and consistently construe a provision of the statute which provides that the powers and privileges of a corporation shall be no different from, but the same as those of a natural person, in such a manner as to render it entirely useless and without meaning, it is difficult to see what purpose can be subserved or what object attained by legislative enactments.

If a corporation has the *exclusive* power to establish its rates of tolls and fares, so has a natural person; and if a natural person has not this exclusive power, then neither

has a corporation; if this be not so then the powers are not the same; but the statute, which creates the corporation, says *they shall be the same.* Let the charter stand, and let the statute prevail; and when a corporation in accepting and adopting its charter, expressly stipulates that it will be content with the possession and exercise of such powers and privileges as a natural person possesses and exercises, let it be bound by the express and plain terms of such stipulation; and especially so in view of the well settled rule that charters of corporations will be most strongly construed against the corporations and in favor of the public. There is certainly in this case no overwhelming necessity impelling the court to so interpret a grant of powers to a corporation as to do violence to the plain intent and meaning of the words used.

In discussing this provision of the charter, the distinguished counsel who has made the opening argument in the case says: "What could be more illogical than to hold that the B. & M. R. R. Co. have by an inviolable contract, as against the legislature of Iowa, the right to receive fares and freight, but that the same legislature has a constitutional right, in the exercise of its unrestricted, uncontrolled sovereign discretion to make those fares and freights as small as they please."

If counsel by this mean to say that the rates of fares and freight, fixed and prescribed by the statute referred to, are unreasonably low, and not compensatory, then the statement is not sustained in point of fact by the record. The averment in the answer is specific and direct, that such rates are compensatory, and there is no shadow of proof to the contrary. And if counsel mean that, by the charter, the company have the right to receive fares and tolls, and therefore the legislature has no power to limit or restrict that right; then it is submitted that the proposition is not well founded, and is presented without due consideration.

It was said by Marshall, Ch. J., in *Providence Bank vs. Billings*, 4 Peters, 563, that: "That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is therefore implicitly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth it may be supposed universal. But it is not universal, and therefore its truth cannot be admitted in these broad terms in any case. *We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction.*"

In *Bank of Republic vs. County of Hamilton*, 21 Ills.,53, it is said that: "Suppose an act passed creating a corporation and conferring upon it the same powers, faculties and capacities of natural persons, and there stops. We cannot conceive of greater powers than would be conferred upon that corporation; and yet as there would be no express or implied contract, that it should be above legislative interference, the lawmaking power may subject it to the same control that it could a natural person."

The same court, in *Ohio & Miss. R. R. Co. vs. McClelland*, 25 Ills., 140, held that: "Corporate franchises in private corporations are vested rights, requiring the protection of government. They are special individual rights, which fall as clearly within the requirement as that of another class. But like the general rights of the individuals, they are subject to be controlled for the general welfare. * * * When such bodies accept their charters, it is upon the implied condition that they are to exercise their rights *subject to the power of the State to regulate their actions as it may individuals.*"

In *Frankford & C. R. R. Co. vs. City*, 58 Penna., 123, it is said by Strong, J., that: "A power or right in the hands of a corporation, can be no greater than the same power or rights in the hands of a natural person. Any regulations which may be imposed upon its exercise by one may be imposed upon its exercise by the other."

In *Thorpe vs. R. & B. R. R. Co.*, 27 Vt., 145, Redfield, C. J., referring to the opinion of Marshall, Ch. J., in *Providence Bank vs. Billings*, said: "This is sufficiently explicit, and, upon examination, will be found to have placed the matter upon its true basis. In reason, it would seem that no fault could be found with the rule here laid down by the great expounder of American constitutional law. *As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground.* And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based."

And it was said by the court in *C. B. & Q. R. R. Co. vs. Haggerty*, 67 Ills., 113, that: "In the exercise of the privileges conferred upon it by the act of incorporation, the company is as much subject to the police laws of the State as an individual pursuing his business."

These authorities abundantly show that the proposition of the learned counsel is not well founded, in fact that it has no support; and that it by no means follows that, be-

cause there may have been granted to the railroad company the right to charge and collect fares and tolls, therefore the legislature retains no power to control the exercise of that right.

If the company claims to be exempt from the operation of this legislative power, it must show that such exemption exists in the language of the charter; and if it cannot be found there in express terms, courts will not insert it by construction.

And not only do these authorities show that the proposition under immediate consideration is without foundation, but they clearly furnish ample support for the position that in the absence of any statutory provision to the contrary, corporations and natural persons are alike subject to legislative supervision and control; and that to whatever extent the legislature of a State may legitimately exercise a supervisory power over the actions of natural persons, in the use, management and ownership of their property, to just that same extent may it legitimately exercise the same power over the actions of corporations. And even if the authorities were not to this effect, still, in the very nature of things, this must be so, since in the absence of an express contract to the contrary, the rights, powers and privileges of corporations are inferior to those of natural persons; and when they insist that they have superior powers and privileges, *they must show the contract therefor*, and then such superior powers and privileges will be accorded them, and will be guarded and respected; not because they are corporations, and therefore as such are hedged about and clothed with powers and rights of some peculiarly sacred and inviolable character, but because of the contract existing between them and the State, and because of the obligation, moral and legal, resting upon all persons and bodies, whether public or private, to observe, respect and abide by a contract solemnly and deliberately made; and this regardless of the fact that the contract so made may prove to have been a very unwise and imprudent one to make. But when it is claimed on behalf of a corporation that a contract exists which limits and circumscribes the powers of the legislature over such corporation, then it is incumbent upon those claiming it, to show the existence of such a contract, in clear and explicit terms. It will never be implied or presumed as against the State.

It is not denied by respondents, in this connection, that it would be competent for a legislature to stipulate with a corporation that it should have the right and power to con-

struct a railroad, and to establish and collect such tolls and fares as in its discretion it should deem proper, and to stipulate that such power and privilege should be exempt from any legislative control. And it would be equally competent and proper to grant the same power and privilege to a natural person, and such powers and privileges would, in either case, be equally sacred and inviolate; and if the stipulation in such case was expressed in the same language, then it would receive, or at least ought to receive, the same construction. And if, in both cases, supremacy over the legislature be asserted, then in both cases the same language and terms in the contract must be relied upon, in support of such asserted right; and, the contract being alike in both cases, if it should be held that as to the natural person the asserted exemption did not exist, then the same result must inevitably be reached in the case of the corporation.

If the position urged on behalf of complainants be correct, then it must follow that in Iowa every corporation has, *by virtue of its own corporate existence*, the right "to make contracts, acquire and transfer property," exempt from legislative interference or control; and this, not because of any contract to that effect with the State, but simply *because it is a corporation.*

In 2 Kent. Com., 224, it is said that "the essence of a corporation consists only of a capacity to have a perpetual succession, under a special denomination and an artificial form, *and to take and grant property, contract obligations*, and sue and be sued by its corporate name, and to receive and enjoy in common, grants of privileges and immunities."

Mr. Kyd says, "that to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: 1. To have perpetual succession, under a special denomination, and under an artificial form. 2. *To take and grant property, to contract obligations*, and to sue and be sued by its corporate name, *in the same manner as an individual.* 3. To receive grants of privileges and immunities, and to enjoy them in common."—1 Kyd 70. See, also, 1 Blacks. Com., 475; Arg. & Ames on Corp., Sect. 110.

A comparison of these powers, which are said to be, at common law, inseparable incidents to the corporation, with the powers enumerated and granted by our statutes, will demonstrate that under its charter the B. & M. R. R. Co. became vested with no greater powers than it would have possessed had the statute simply provided for its in-

corporation; and remained entirely silent as to grant of powers. Therefore, it is, that since the statute grants no other, or different power, or privilege, from that which exists without any grant, a corporation claiming a power or privilege by virtue of such statutory grant, has precisely the same rights, and is entitled to precisely the same immunities and exemptions, that it would have, and would be entitled to if no such statutory grant existed. If therefore it be true, that a corporation having a statutory power "to make contracts, acquire and transfer property," is beyond the reach of any legislative control, then a corporation which has by common law the same powers, is also beyond legislative control. But a corporation having only a common law right to make contracts, and acquire and transfer property, could not set up any chartered right to exemption from legislative supervision, and hence, we insist that since the charter conferred no power except such as necessarily attached as an incident to a corporation, and such as by the common law it would have possessed, if the charter had been silent as to powers and privileges; such powers and privileges so expressly conferred, are of no more sacred or inviolable character than would have been the case had no powers or privileges been granted. In other words, a grant of power to which the grantee would have had a perfect right, had there been no grant, does not invest such grantee with any greater right or better title, than would have existed without the grant; and hence since the railroad company had the same powers and privileges, as incident to its existence as a corporation, that are enumerated in its charter, such powers and privileges are subject to the same legislative control and restriction, that they would have been, had they not been mentioned in the charter.

3. It may safely be said that the Legislature has not in express terms delegated to the company the exclusive power to fix its own tolls or compensation, and to exclusively and permanently prescribe and regulate its own charges; and that if the company has any such power it gets it by inplication. But before courts will hold that it exists by implication, it must be made clearly to appear that the existence of the power is actually necessary to the end that the company may enjoy and exercise those rights, powers and privileges which have been expressly given. Now, it cannot be successfully maintained, that absolute non-interference from any and all sources is essential to the end that the object and purpose for which a railroad

company is incorporated may be attained, since at most all that can be required in this respect is, that the rates of tolls and fares shall be compensatory, and such as afford a reasonable remuneration for the services rendered and benefits conferred. And therefore, it is, that the implied contract, if any at all, can only be that the company shall have the right to charge and collect reasonable tolls and fares. In fact it is conceded by complainants that they have only the right to insist upon reasonable and compensatory rates, and that any charges in excess thereof are illegal; but they insist that this question of reasonable rates and compensatory charges, shall be submitted to the courts, and is in no respect a matter for the Legislature to inquire into.

This, however, is abandoning the matter at issue, which is whether or not, strict non-interference is essential to the enjoyment and exercise of right expressly given; and when it is once conceded that this question may be answered in the negative, then this portion of complainants' case fails. The admission that there is a higher power, either judicial or legislative, it matters not which, that may properly control a corporation in respect to the amount of toll or fare that such corporation may exact, is a complete concession, that it is not true, that such corporation must be permitted to exercise its unrestrained and unlimited discretion as to the amount of such tolls and fares. It is true, that it is not an admission of the legality of legislative restriction and control, but it nevertheless *admits away the whole question of control and restriction*, and leaves for determination the simple question, whether such control shall be exercised by the judicial or the legislative branch of the Government. It concedes that the power of control exists somewhere, and for the purpose of this branch of the argument, it is perfectly immaterial in what department this power of supervision rests; it is only material to show that it exists in such a place and such manner that it may be exercised.

So frequently has it been held that railroad companies, as common carriers, must serve all for a reasonable compensation, and without any unjust discrimination, and that courts will compel them to perform such service for a reasonable compensation, that it is certainly unnecessary to occupy time or space in citing cases to that effect. In fact it is alleged in complainant's bill, and expressly admitted in the printed argument of counsel, *that only reasonable rates can be exacted.* Since then, only reasonable rates can

be legally collected, and since there does exist a power that can legitimately exercise control over the rates of charges fixed by the corporation, it follows that no grant of exclusive power to the corporation to fix its own rates can be implied or inferred.

There can be no more reason for holding that the legislature, in the absence of any express grant to that effect, intended to exclude the legislative power from future interference to regulate these charges, than there is for presuming that it intended to exclude the judicial power from such interference. It was unquestionably as entirely within the scope of the power of the legislature, at the time that the charter was granted, to exempt the company from judicial as from legislative control.

If, therefore, it be insisted that there has been impliedly granted to the B. & M. R. R. Co., the power to establish its own rates free from all legislative interference, then it must logically be conceded that this power is also exempt from judicial interference, and hence that *by implication only* the company has the power, free and exempt from either judicial or legislative supervision, to establish its own rates of fare and toll; a conclusion so abhorrent to all notions of law and justice, that it is expressly rejected by complainants.

It will however be found impossible to presume that the charter intended to preclude the legislature from exercising future control over such charges, without also presuming that the same intention existed as to judicial control. In truth no such presumption should prevail as to either department of the government.

4. The grant of a right to collect fares and tolls is simply a franchise, and a franchise is simply property, nothing more, and is no more beyond or exempt from the control of the law than any other kind of property. The corporation owning a franchise can be compelled to use it in such manner as the advancement and promotion of the general good of the community may require: such corporation holds its franchise by a tenure of just as high and sacred a character as it would hold any real property granted to it by the State. Now, if the State were to grant to the corporation a tract of land, it could at once, in the exercise of the power of eminent domain, take the land for public use, and the corporation would not be permitted to interpose the objection to such taking, that since the State had, by a contract, conveyed the land to the corporation, it could not, without impairing the obligation of such contract, take the land for public use.

But land is property, and the title thereto obtained and held by contract; and a franchise is also property, and the title thereto obtained and held by virtue of a contract with the State. If, then, the land and franchise are both property, and the tenure of both is derived by a contract with the State, and if the land can be taken for public use without impairing the obligation of the contract, it follows, does it not, that, if necessary, the franchise can also be taken, when the public use requires? But *if it may be entirely taken away* to subserve the public good, it is an irresistible conclusion that it may be controlled and regulated whenever and to whatever extent the public necessity demands. The greater proposition necessarily includes the less.

The paramount duty of government is to exercise all the functions that inhere in every sovereign power, to the extent which shall be deemed commensurate with the public necessity; and if, in so doing, it shall be considered necessary to take private property, to regulate its use and to restrict the owners in the unlimited control of it, and thereby lessen its actual value, these things may be legitimately done and justified upon the broad fundamental principle that lies at the foundation of the government, and that is absolutely essential to its very existence, viz: that all private rights, whether of persons or corporations, are and must be subordinate and subservient to the good of the public, and that private rights must yield to public necessity.

Not only is this true upon principle, but it is supported by authority.

It was expressly decided in the case of the *West River Bridge Co. vs. Dix*, 6 How. 507, that a *bridge and the franchises* of a corporation might be condemned and taken as part of a public road; that a franchise was property, and that as such, it, with the other property of a corporation, could be taken like the property of a natural person, when required for the public use.

The same question was involved in the case of *Richmond &c. R. R. Co. vs. Louisa R. R. Co.*, 13 How. 71, and was decided in the same way. The court says, p. 83: "The grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and when the public necessities require it, the one, as well as the other, may be taken for public purposes, on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts." The following cases expressly recognize the same doctrine, viz.:

Boston Water Power Co. vs. Boston & Worcester R. R. Co., 23 Pick. 360.

The Enfield Toll Bridge Co. vs. Hart. & N. H. R. R. Co., 17 Conn., 453.

The N. Y. &c. R. R. Co. vs. Boston, Hart. &c. R. R. Co., 36 Conn., 196.

It is then entirely competent for a legislature to provide that the property including the franchises of a corporation, may be taken for the public use and to promote the public good and accommodation ; and in so doing it violates no contract express or implied existing between the State and the corporation. Now, if in the grant of a franchise to erect a bridge, construct a road, or keep a ferry, and collect tolls and fares for the use thereof, there is no implied contract that the State will not, in the exercise of the power of eminent domain, extinguish such franchise whenever the public good shall thereby be promoted, why is it not equally true, that in the grant of franchise to take tolls and fares, there is *no implied contract*, that the State will not interfere to regulate the amount of such tolls and fares.

It is no answer to this to say, that the State, in exercising the power of eminent domain over the franchises of a corporation, provides that a just compensation be made for the franchise thus taken and appropriated by the State for the public use. Since the question is not of compensation, but is one of power; not whether the corporation shall receive an equivalent in value for the franchise thus taken and appropriated, but whether the State can legally compel the corporation to submit upon any terms, to the use thus made of its franchise by the public. And if it be true that there is no implied relinquishment of this power, in the charter, then it is equally true that in granting a charter, the State never, by implication, abandons the right and duty to exercise any attributes of sovereignty. This power in the State, is ever retained, unless surrendered by express stipulation; and under it, the Legislature may legitimately direct, limit and restrict the corporation in the use of its franchises, whenever promotion of the public welfare demands, even though in so doing the franchises may be made less valuable, or the profits and revenues derived therefrom be diminished.

5. The power to make contracts, by no manner of means, includes by implication the power to make any contract that the corporation may in its discretion elect to make.

We concede that by its charter, the B. & M. R. R. Co.,

was authorized to construct and operate a railway and to make contracts; but this authority did not confer upon the company the power to construct and operate a railway in such a manner, as in its discretion, it should choose to adopt, nor to make all contracts that the company should deem to be advisable or expedient. Notwithstanding such authority in the charter, the Legislature retained the power to prescribe the manner in which the road should be constructed and operated; and also the power to define the limits within which the right to make contracts, should be restricted and exercised. If no such power had been retained, then the Legislature would have been impotent to require the company to fence the road, to construct and maintain cattle-guards, to provide suitable crossings for the public at proper places, to limit the rate of speed of trains through cities, to specify what acts should constitute negligence, to provide that the company should be responsible to an employee for damages sustained on account of negligence of a co-employer, or in fact, to do any one of the many things in the way of legislation, that has been done, and the validity of which no one calls in question.

If no such power had been retained in relation to the authority given to make contracts, then the company has the right to insist upon compelling every person asking for transportation for himself or his property to agree in advance not to hold the company responsible for any damages sustained by reason of the negligence of the company or its servants.

It has, however, been too frequently held that such contracts cannot be made and enforced; that a company can be compelled to fence its road, to construct and maintain cattle-guards, to provide and keep in repair crossings at suitable places, &c., to have such legislative power now challenged; and if the power exists in respect to these and kindred matters, then it is not true that the corporation has a *chartered right* to operate its road, and to make such contracts, as it may deem expedient, irrespective of the rules and regulations, limitations and restrictions, which the Legislature may prescribe.

It is clear, we think, that neither in express terms nor by implication has the Legislature, in the charter granted to this railroad company, divested itself of the power to enact the law under consideration. If the power ever existed to provide the maximum rates of tolls and fares, then the power still exists; it has not been contracted away, nor transferred to the corporation.

III.

The act is legislative in its character, and within the scope of the legitimate powers of the legislature.

1. It has been suggested that even if the State is not estopped, by the grant of the charter to the company, from asserting and exercising the power to enact this law, still the law is invalid, for that it is not legislative in its character, and is not within the domain of legislative powers.

This, however, cannot be true unless it be also true that such rights would not exist, even though expressly reserved in the charter; for the express reservation of a supposed right does not convert it into an actual right; unless the right or power in fact first has an existence, no formal stipulation that the exercise thereof shall be retained, can give it any force or vitality. The reservation of a power that has no existence is no reservation at all; most assuredly by such reservation no actual power of legislation is created.

It has, however, been frequently held to be competent for the legislature, by a provision in the charter, to reserve to itself the right to supervise and regulate the rates of tolls and fares, and that when such reservation has been made the legislature may, at its discretion, exercise such right.

P. W. & B. R. R. Co. vs. Bower, 13 Law Register, 174.

Zabriskee vs. R. R. Co., 3 C. E. Green, 180.

Whiting vs. Sheboygan & C. R. R. Co., 25 Wis., 167, 198.

Parker vs. Metropolitan R. R. Co., 109 Mass., 506.

And from this it follows that the act of regulating tolls and fares is legislative in its character; and that the clause of reservation simply prevented the legislature from being divested of a right which it then possessed, and which, but for such provision, would have been conferred upon the company. The reservation saves a right or power, it creates none. From the very nature of things this must be so. The corporation is a creature of the legislature, having such powers, faculties and functions as is given to it by law; and it would be impossible for this creature of the law, possessing only the powers and functions with which it has been endowed by law, to enlarge the powers and capacities of its creator, the legislature, and to clothe that body with a right and power which it had never before possessed. The creator may, in fact, must be, the source of all power to the object of its creation; but it is a startlingly novel doctrine, that the creator can from that which it has created, derive new powers and obtain additional capacities.

If the reservation clause in the charter alone confers upon the legislature the power to pass an act of this character, then a natural person, having no charter, and therefore not hampered with this reserved clause, may own and operate a railway without being liable to be effected by such legislation, and so the anamolous conclusion is reached that an act may at the same time both be and not be of a legislative character; that it may be legislative when applied to a corporation, and not be of that character when applied to a natural person, a conclusion too absurd to admit of serious consideration.

Whether a legislature, in the enactment of a statute, has or has not exercised purely legislative functions, depends, not at all upon the object or person to be affected by such enactment, but upon the nature and character of the act.

The legislature of a State possesses inherently, as an attribute of sovereignty, that which is sometimes called the police power, sometimes the governmental power; but whether designated by one name or another, certainly the power under and by virtue of which all laws are made for the safety and happiness of the people, for the general welfare of society, for the promotion of the public good, for the protection of personal liberty, for the preservation of public peace, for the establishment of justice, and for the security of the people of the State in possession and enjoyment of their rights and property. The act in question is the legitimate exercise of this sovereign power.

In speaking of this power, Taney, C. J., in the *License Cases*, 5 How., 518, said:

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty, to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice or requiring certain instruments to be recorded, *or to regulate commerce within its own limits*, in every case it exercises the same power; that is to say, *the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute* as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States."

It was said by Shaw, C. J., in *Com. vs. Alger*, 7 Cush, 53, that:

"The power we allude to is rather the *police power*, that

power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, *not repugnant to the constitution*, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects thereof. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe its limits."

In the case of *Ohio & Miss. R. R. Co. vs. McClelland*, 25 Ills., 140, where it was held that railroad companies could be required to fence their roads, it was said: "The power to enact police regulations operates upon all alike. This is a fundamental principle, and lies at the foundation of society itself. It is yielded by each member when he enters society, for the benefit of all. It is incident to, and a part of government itself, *and need not be expressly reserved, when it grants rights or property to individuals or corporations, as they take subservient to this right.*"

In the *Slaughter House Cases*, 16 Wall., 62, it is said:

"This is called the police power; and it is declared by Chief Justice Shaw, that it is much easier to perceive and realize the existence and sources of it, than to mark its boundaries or prescribe its limits. This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It extends, says another learned judge, to the protection of all property within the State; * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State."

And Breese, C. J., in *Munn & Scott vs. People*, Chi. Legal News, Feb. 14, 1874, said:

"We place the right to legislate on this subject, upon that power, call it by what name you will, inherent in every organized civil government *Every sovereign power possesses, inherently, unlimited legislative power when the organic law imposes no restraints. The power to legislate on all subjects affecting the great interests of the whole community must be conceded to exist* and it will not cease to exist until civil government shall be resolved into its original elements."

By virtue of this broad, comprehensive, and, except where restrained by clear constitutional provisions, unlim-

ited and omnipotent legislative power, it was held in *Com. vs. Alger*, 7 Cush., 53, that the legislature had power to establish lines in a harbor, beyond which no wharf should be extended or maintained, and to declare a wharf extended beyond such lines a nuisance, even though extended by a person on his own land, and when extended caused no actual injury to navigation.

In *Commonwealth vs. Tewksberry*, 11 Met. 57, it was held competent for the legislature to make it a criminal act for the owner of land bordering on tide-water to remove gravel from his own land ; and this, upon the ground that "it was a just and legitimate exercise of the power of the legislature, to regulate and restrain such particular use of property, as would be inconsistent with, or injurious to, the rights of the public."

In the *Slaughter House Cases*, 16 Wall 36, an act was held to be valid which granted to a corporation the exclusive right to erect and maintain slaughter houses within certain territorial limits, imposing upon the company the duty of erecting one grand slaughter house, of sufficient capacity for slaughtering five hundred animals per day, and which prohibited, under severe penalties, all persons from slaughtering animals at any place, even on their own premises, within said limits, except at the houses erected and owned by said company ; and at the same time compelled all persons to pay the company for the privilege of slaughtering at such houses.

The legislature of Alabama authorized the city of Mobile to regulate the weight and price of loaves of bread. The city passed an ordinance *fixing the weight and price of the loaves* that bakers should sell. This ordinance was held valid in the case of *Mayor, &c., of Mobile, vs. Yuille*, 3 Ala. 137. The court says, p 140: "There is no motive, however, for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, *unless such calling affects the public interests, or private property is employed in a manner which directly affects the body of the people.* * * * Upon this principle is found the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects.

The legislature having full power to pass such laws as may be deemed necessary for the public good, their acts cannot be impaired on the ground that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day."

In the case of *Olcott vs. Banfill*, 4 N. H. 546, the court say: "There are certain cases in which, if individuals dedicate their personal services or the temporary use of their property to the public, the law will impose certain duties upon them, and regulate their proceedings to a certain extent. Thus, a common carrier is bound by law, if he have conveniences for the purpose, to carry for a reasonable compensation. The law is supposed to be the same with respect to the owners of stage coaches.

All persons are restrained from exercising the business of inn-keepers, without a license; and certain duties are imposed upon those who exercise the business, by a statute. And the toll to be taken at grist mills is regulated by statute. *In these cases, the law interferes; because such employments concern the public.*"

It was held in Mass., in *Com. vs. Intoxicating Liquors*, 115 Mass., 153, that a statute prohibiting the manufacture for sale, and the sale of malt liquors, did not impair the obligation of contract in the charter of a corporation, incorporated many years prior to the passage of the prohibitory statute, for the purpose of manufacturing malt liquors; and this, although the legislature had not the power to alter, modify or repeal the charter which expressly authorized the company to manufacture such liquors. In the opinion of the court, the following language is used, viz.:

"The claimant in this case contends that, having been created for the purpose of manufacturing malt liquors, under a charter, which the Legislature has no power to alter, modify or repeal, it has the right to sell the products of its manufacture, notwithstanding the provisions of the statute relating to the manufacture and sale of intoxicating liquors. We do not think this position tenable.

"By its charter the claimant is a private manufacturing corporation, with the same power as a natural person, to do that which its charter authorizes; and by implication, with the same power as an individual to deal with and sell its property so manufactured."

"But the authority of the legislature over the property of a corporation is not lost, because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting or prohibiting the sale of particular kind of property for the general benefit, apply as well to the property of corporations, like the claimants, as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike suject

to them. Indeed all property is held subject to such restriction, and it is immaterial that the restriction is imposed after the property is acquired or becomes valuable, or after the charter is granted, or before it becomes necessary in the judgement of the Legislature to pass a law on the subject. Every such law limits, restrains, impairs, and in some cases destroys the uses, which were previously enjoyed, of the property so made the subject of legislation, but the extent to which it may do so, does not affect the validity of such laws, or their equal application to all owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury in the proper and legal sense of those terms."

The Legislature of Illinois by statute regulated and limited the charges to be made by warehousemen for the storage of grain; this statute was, in *Munn & Scott vs. People, Supra*, held to be a valid and legitimate exercise of legislative power and discretion; the court says:

"Can there be any more legitimate subject for the action of a legislative body? We think not. And if in the means prescribed by the legislature to that end, *some reduction in the monthly or annual receipts may be the result*, can it be said the owners are thereby deprived of their property?

* * * * * * * *

Familiar instances are found of the exercise of this power," (to make all lawful rules and regulations respecting the use and enjoyment of property,) "in the regulation of public ferries and public mills, and affixing the compensation in the shape of toll. Another, in delegating power to municipal bodies to regulate the charges of hackmen and draymen, and the weight and price of bread."

In nearly every State, laws exist regulating and limiting the rate of interest that may be charged and collected for the use of money; and the validity of such statutes has been uniformly recognized; in fact scarcely has any person been bold enough to question such validity. And yet, it will be found very difficult indeed, to find any warrant for such legislation, except the broad fundamental principle that the Legislature may, except when expressly inhibited, enact such laws as appear to be for the general welfare of society and advancement of the public good. Certainly, there can be no statute enacted which more directly interferes with, and limits the right and power of persons over their own property, than a law which expressly prohibits a

person from contracting to receive a greater compensation for the use of his money, than that named in the law; and this, even though both lender and borrower voluntarily consent to the inhibited stipulation.

And not only have such laws been uniformly sustained but it has been held that, after an institution had been incorporated for the purpose of loaning money, having the right and power to loan money at the then legal rate of interest, the Legislature could legally, and without impairing the obligation of the contract contained in the charter of the corporation, *reduce the rate of interest at which it should be lawful for the corporation thereafter to loan money;* the court using the following language:

"The Legislature, by giving to the institution the privilege of being a corporation, and of managing its proper business, did not relinquish any power of legislating on all proper subjects of legislation.

The institution, at the time it was incorporated, had the right and power, under the general laws, to loan money at six per cent. interest, but there can be no doubt that *the legislature could alter the law so that the institution could take only four or five per cent. interest,* 9 *Cushing,* (*Mass.*) 604-611-612.

It is not easy to see why, if a legislature may legitimately reduce the rate of interest, that a bank may lawfully charge and receive for the use of its money, even when such bank has been previously chartered for the purpose of loaning money, it is not also a proper exercise of legislative power to reduce, in some degree, the rates of fares and tolls that a railroad company may lawfully charge and exact, for the transportation of freight and passengers, even though such company was chartered for the purpose of engaging in such business, prior to the enactment regulating and reducing such rates.

If one may be done, so may the other: the conclusion is unavoidable.

A familiar instance of the exercise of this power is found in the ordinances of cities, which limit the charges which hackmen and draymen may make for their services. It is no answer to this to say, as suggested by counsel, that such ordinances are legitimate, because the hackmen and draymen use the paved streets and public stands of the city, since a city having no paved streets, nor providing any public stands, may just as legitimately enact such ordinances, as a city having both the streets and stands.

The validity of these ordinances is based upon the fact

that the avocation and employment of the persons affected, concern the public, and therefore the public good will be subserved by such ordinances.

In an opinion delivered in *Lansing vs. Smith*, 4 Wend. 22, 23, Chancellor Walworth said: "But even the taking of a common wharfage, or toll at a ferry, is a franchise, subject to the control and regulation of the legislature, and cannot be lawfully exercised without their permission. * * * If that patent is to be considered a grant of a right to erect a wharf, there is an implied reservation of the right of the legislature to regulate the use of that wharf, and the waters adjacent, *and to fix and determine the amount of wharfage. By the common law, such a reservation was implied in every grant of that description.*"

Why is not a similar reservation implied in the charter granted to the B. & M. R. R. Co? Should not the same principle of construction that obtains in the one, hold good in the other?

In the case of *Charles Riv. Bridge vs. Warren Bridge*, 7 Pick., 345, the power of the legislature over ferry franchises was discussed at considerable length by the court; and Morton, J. (p. 445), said: "It cannot be supposed that the college had the exclusive right to the transportation across the river, and also the unlimited power to fix the rate of toll for such transportation. The college, in accepting the right granted, assumed corresponding obligations. If they were to receive the profits of the ferry, they were bound to furnish reasonable accommodations for the public; to submit to the general regulations of ferries throughout the State; *and to take such just and reasonable toll as from time to time the legislature should establish. Such seems to be the tenure by which ferries were generally holden, except in cases where the toll or other stipulations were fixed in the grant.*"

Parker, C. J., (p. 511), said: "And the college thus became the owners of the ferry, subject to such regulations as should from time to time be made by the legislature for the public accommodation and convenience. These regulations are not inconsistent with a right of property in the college, *for the legislature having originally the only right to grant the exclusive privilege of transportation over public waters, and to establish tolls, etc., the grant of this privilege would always be considered as subject to the superintendence of the legislature, unless that was expressly surrendered.*"

The Board of Freeholders of Hudson County, New Jersey, adopted an ordinance fixing the rates of ferriage over the ferry from Jersey City to New York. It was contended, on the part of those claiming the proprietorship of the ferry, that the ordinance was in violation of the Constitution of the United States, in that, it impaired the obligation of a contract. The validity of the ordinance was sustained; the court, in deciding the case, say; "Supposing it to be a fair inference, that there was anciently a grant as private property, *it does not follow that it was also one of the terms of the grant, that the owner may take such fares as he pleases.* That a grant of a ferry in England implies no such right is admitted *So long as no regulation on the subject is prescribed, the grantee has undoubtedly a right to take reasonable fares, and no more. But it belongs to the government to say* what are reasonable.

"Whether this or any other ferry in New Jersey is now, or ever was a franchise in the strict common law meaning of that term, so as to give an exclusive right, it is unnecessary now to decide. *If it be such a franchise, it is subject to the police regulations of the government, as well in regard to fares as to other matters.*"

Freeholders of Hudson County vs State, 4 Zabr. 718.

In the case of *People vs. Mayor of New York*, 32 Barb., 112, it is said by Hogeboom, J.: "Title to property is always held upon the implied condition, that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the forms of law, demand.

"In regard to ferries, I am of opinion that there is a still further right of *regulating the rates of ferriage*, and of so controlling ferry franchises and privileges in the hands of grantees or lessees, that they shall not be abused, to the serious detriment or inconvenience of the public. It seems to me that *the grantees of ferries, or ferry rights, must be deemed to accept them subject to these implied conditions.*

"It may be said that the legislature under pretense of regulating the right, might practically destroy it by reducing rates of ferriage to a non-remunerative standard. This is possible. Like all other powers of a similar character, like the taxing power, it is susceptible of abuse. It is not to be presumed that the legislature will do injustice. If they prove recreant to their duty the remedy consists in giving their places to others, and reforming the evil."

It is evident therefore, that it is competent for the legislature to prescribe the rates that owners of ferries may law-

fully charge, and this power is not accounted for on the ground that the State owns the water in the streams, and may therefore dictate the terms upon which it may be used, since courts have never assigned such reason for the existence of such power; but have uniformly based their decisions upon the fact that the legislature having originally the exclusive right to grant a ferry franchise and establish toll, could therefore, from time to time, regulate the use of such franchise and the amount of tolls, as the public good and accommodation should require, except where such right and power had been surrendered. In no instance has the recognition of the existence of this power been based upon the ownership of the waters.

Statutes requiring railroad companies to fence their roads, have been held valid, and to be the legitimate exercise of legislative functions. *Ohio & Miss. R. R. Co. vs. McClelland*, 25 Ills. 140; *Norris vs. Androscoggin R. R. Co.*, 39 Maine 274; *Galena & Chi. R. R. Co. vs. Appleby*, 28 Ills. 283; *Nelson vs. Vt. & Canada R. R.* 26 Vt. 717; *Price vs. Han. & St. Joe. R. R. Co.*, 49 Mo 438; *Gorman vs. Pacific Ry.* 26 Mo. 441. So too, of statutes requiring railway companies to construct and mantain cattle-guards. *Thorpe vs. R. & B. R. R. Co.*, 27 *Vt.* 140; where is was said, that: "While it is conceded that the Legislature could not prohibit existing railways from carrying freights and passengers, it is believed that beyond all question, *it may so regulate matters as to impose many obligations and restrictions upon those roads, materially affecting their profits.*"

So, also, it has been held that a legislature may make railway companies responsible for all losses caused by fires occasioned by their engines, without regard to the question of negligence: *Lyman vs. Boston & Wor. R'y*, 4 Cush. 288; *Rodemaker vs. Mil. & St. P. R'y*, decided at September term, 1875, Supreme Court of Iowa, and not yet reported. In this case, the court say: "If, then, in the nature of the interests involved, there could have been no objection to a general provision in the incorporation law, making railroads liable for all damages occasioned by fire, there can be no valid objection to imposing such liability after the incorporation of the company; for the law contains no guaranty that a corporation shall be exempt from such interference."

And in the recent case of *R'y Comrs. vs. P. & O. C. R. R. Co.*, 63 Maine 269, the court determined, that an act empowering railroad commissioners to direct a railroad com-

pany to erect and maintain a depot at a specified place on the line of its road, was constitutional, and not an infringement upon the charter of the company; and further held, that the company could be compelled to comply with the order and direction of the commissioners, and to erect and maintain a depot at the point designated. Dickerson, J., said: "In the circumstances of their origin, and in their powers, uses and duties, railroad corporations are clearly distinguished from other merely private corporations; and unless we keep these characteristics in view when we come to determine the rights, powers, and duties of such corporations, and the authority, express, implied or reserved, of the legislature and court in respect to them, we shall run the hazard of confounding dissimilar distinctions, and committing grave errors. What analogy, it may be asked, do ordinary corporations, evoked by no public necessity, exercising no sovereign powers, subserving no public uses and subject to no public duties, bear to railroad corporations, that both should alike have the same legal status? Do not these distinguishing characteristics make railroad corporations *quasi* public corporations, in respect to the authority of the court and legislature to determine and enforce the public duties enjoined upon them? If not, what redress have the public for a neglect, infringement or violation of those duties?"

In *Brannin vs. Conn. & P. R'y*, 31 Vt., the court held, that a statute making the company liable for the wages of day laborers, employed by contractors upon the construction of the road, was valid, and did not impair the obligation of the contract contained in the charter of the company. Aldis, J., said: "The power of the legislature to pass all laws required by the public welfare, and to subject corporations, like natural persons, to their operation, is most unquestionable."

It was held, in *C., B. & Q. R. R. Co. vs. Haggerty*, 67 Ills. 113, that an ordinance of a city, regulating the rate of speed at which trains may be run within the city, was valid. The court said: "Nor has the railway company any just ground of complaint that the regulation interferes with the powers conferred upon it, in the act of incorporation, or by any other law of the State. In the exercise of the privilege so conferred upon it, the company is as much subject to the police laws of the State, as an individual." And the same court, in *Chi. & Alton R. R. Co. vs. People*, 67 Ills. 11, held, that the legislature could, by statute, prevent a railway company from making discriminations in

their rates of charges between individuals or communities; and this, although the company was, by its charter, authorized to make contracts, and to establish its own rates of tolls and fares. And in this connection it may be remarked that, if the Chicago & Alton R. R. Co., with the full power to contract, and with the further express power to establish rates of freight, could be prevented by statute from discriminating either between persons or communities, it is not exactly clear how the complainant in this case can successfully maintain the position that the mere power to contract authorized and empowered the Bur. & Mis. R. R. Co. to fix such rates of freights as it should see fit to establish. If, under a naked power to make contracts, a railroad corporation can establish such rates as it chooses, free from interference by the legislature, then it follows, of course, that it can make such contracts as it chooses to dictate to its patrons, and so may agree upon one rate with one person, and another and entirely different rate with another person; and there can be no power, legislative or otherwise, to prevent such action. But that is precisely what the Supreme Court of Illinois, in the last case cited, decided could not be done.

It is a noteworthy feature in all of these cases, involving the validity and construction of statutes limiting and restricting railway companies in the management of their business and the operation of their roads; fixing their liabilities and regulating the manner in which they shall conduct their affairs that the companies have, without exception, in every instance presented, as affecting such validity, the objection, that the particular act under consideration, impaired the obligation of the charter contract, andwas therefore unconstitutional.

The history of jurisprudence presents no parallel for the unyielding obstinacy, the unrelenting pertinacity with which railroad companies have stoutly and stubbornly resisted at all times and under all circumstances, every effort on the part of any branch of the Government to assert and exercise any power of control over them, or to interfere in the management of their affairs, or the use of their property. Every legislative enactment containing, restrictive, or directory provisions, has been considered by them as an unwarranted encroachment upon their chartered rights, and treated accordingly.

The power of the Legislature to control and regulate the use of franchises granted to railway companies, and to limit from time to time the amount of toll and fare which it should

be lawful for them to charge, while not perhaps expressly and authoritatively adjudicated, was nevertheless very clearly recognized at a very early period in the existence of such companies.

Thus, Chancellor Walworth in the leading and well known case of *Beekman vs. Sar. & Schen. R. R. Co.* 3 *Paige Ch.* 77, said:

"The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without reasonable excuse, upon having paid the usual rate of fare. *The Legislature may also, from time to time, regulate the use of the franchise, and limit the amount of toll which it shall be lawful to take,* in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road."

And Woodbury, J., in the *West River Bridge case,* 6 How., 546, in speaking of the circumstances under which, and of the objects and purposes for which, the legislature might properly exercise the powers of eminent domain, said:

"So as to a road, if really demanded in particular forms and places to accommodate a growing and changing community, and to keep up with the wants and improvements of the age, such as its pressing demands for easier social intercourse, quicker political communication, or better internal trade, and advancing with the public necessities from blazed trees to bridle-paths, and thence to wheel-roads, turnpikes, and railroads. * * * *

The user must be for the people at large, for travelers, for all must also be compulsory by them, and not optional with the owners, must be a right by the people, not a favor, *must be under public regulation as to tolls, or owned, or subject to be owned by the State, in order to make the corporation and object public for a purpose like this.*"

In commenting upon these cases, counsel say that the language quoted was not used, "to decide cases, but to reconcile the public to the use of a power which the courts, for the want of the knowledge of results now possessed, looked upon with suspicion and jealousy." This criticism, however, is neither just nor well founded; courts had for

more than half a century too often and for purposes too varied, sustained the exercise of this power, to view it "with supicion and jealously"; and beside this, the public had become too familiar with the use of the power, in the establishment and construction of bridges, highways, turnpikes, plank roads, canals, etc., to require any assurance from the judiciary that the power would never be permitted to be used for improper or doubtful cases. Not only was this so, but the public were willing that more than ordinary rights, powers and privileges should be granted and conceded to persons and corporations that would undertake the construction and operation of works and improvements requiring the use and expenditure of so much capital as the construction and operation of railways required; and therefore there was no occasion for any reconciliation or assurance. It was said by Shaw, C. J., in Boston & Lowell R. R. *vs.* Salem & Lowell R. R., 2 Gray, 28, in speaking of this very matter: "This was one of the earliest acts, providing for the establishment of railroads in this commonwealth, for the transportation of passengers and merchandise. * * * Of course neither the government nor the undertakers had any experience, and could not form any accurate or even approximate estimates of the cost of the work or the profits to be derived therefrom. * * * With this want of experience, and with an earnest desire on the part of the public to make an experiment of this new and extraordinary public improvement, it would be natural for the government to offer such terms as would be likely to encourage capitalists to invest their money in public improvements; and after the experience of capitalists in respect of the turnpikes and canals of the commonwealth, which had been authorized by the public, but built by the application of private capital, but which investments had proved in most instances to be ruinous, it was probably no easy matter to awaken anew the confidence of moneyed men in these enterprises." Such was the language of an eminent jurist, more than twenty years ago, and who was twenty years nearer the time of which he was speaking, and hence was, in all probability, better informed of the actual condition of things existing at the time of which he spoke, than are those of the present day. And it is worthy of note that this language was used only seven years after that used by Judge Woodbury in the West River Bridge Case; and hence it is but fair to infer that the latter entertained the views expressed by him in that case, although conscious

of the fact that the government was willing to offer such terms as would be likely to encourage capitalists to invest their money in public improvements. When, therefore, it is considered that the views of these eminent jurists were expressed at a time when the public were willing to make any reasonable concession necesary to induce the investment of capital in the comparatively untried experiment of constructing and operating railways, they are certainly entitled to great weight.

In the case of *Whiting vs Sheboygan R. R. Co.*, 25 Wis., 167, 195-197, Dixon, C. J. refers approvingly to the views expressed by Chancellor Walworth and Judge Woodbury, in the cases before cited; and then adds: "The public use, therefore, which has been held to justify the application of the doctrine of eminent domain in the case of these railroads owned and operated by private individuals, consists in the fact that the owners cannot, without reasonable excuse, refuse to receive passengers and freight when offered at usual rates, and in the fact that, *the State retains the power to regulate and control the franchise, and limit the amount of tolls which it shall be lawful for the owners to charge.*"

And the court in the *R. R. Comrs. vs. P. & O. C. R. R. Co.*, 63 Maine 269-280, adopts the language of Judge Woodbury, as being a correct exposition of the law concerning the ample power possessed by the Legislature to regulate railway companies in the use of their franchises. It is clear that each of the eminent Judges, from whose opinions in regard to the power of the State to regulate tolls and fares of railway companies, the foregoing quotations are made, unquestionably held to the doctrine, that this power was inherent in the State, was legislative in its character, and could be exercised from time to time as the common good should require, except where the power had been expressly surrendered to the corporations.

In the cases of *Blake vs. Winona & St. Peters R.R. Co.*, 19 Minn. 418; *and Attorney General vs. Railroad Co.*, 35 Wis. 425, it was expressly and positively held that statutes, similar in their main features and provisions to the Iowa Statute, were valid, did not impair the obligation of the contract contained in the charters of the railway companies, and were but the legitimate exercise of the ordinary legislative power of the government.

In a very recent and important case, the Supreme Court of Illinois assumed the validity of a similar statute; at least it was not questioned or doubted, that the power existed

to pass such a law. The court held that the pleadings were not properly framed to entitle the complainant to recover the penalty prescribed for a violation of certain provisions of the law, but did not intimate or suggest that the law itself was in any respect invalid, or that the enactment was not within the legitimate exercise of legislative functions.

We have thus seen that the legislative branch of the Government may make it a crime for a person to remove stone and gravel fron his own land; may prohibit him from erecting a wharf on his own premises; may prescribe and regulate the amount of tolls that may be lawfully taken at a ferry, or for grinding at a mill; may designate the price at which bread shall be sold in a city, and regulate the charges to be made by hackmen and draymen; may determine the amount of wharfage which the owner of a wharf can lawfully exact; may limit the price which the owners of warehouses and elevators may demand for the storage of grain; may prohibit the sale of malt liquors, even by corporations expressly incorporated for the purpose of manufacturing such liquors, may prescribe and regulate the rates of interest to be charged for the use of money, even though such regulation may make it illegal for an incorporated bank to charge the rate of interest that was permitted to be charged by such bank, at the time of its incorporation; may compel railway companies to fence their roads, to provide suitable and convenient public crossings; to construct and maintain cattle-guards, and to pay all damages occasioned by fire communicated by their engines, and this, even though guilty of no negligence; may make them responsible for the wages of day laborers employed by contractors in the construction of their roads; may limit them in the rate of speed at which they can run their trains within the limits of a city, and may determine at what point on the line of the road a company shall establish and maintain a depot; may by law prevent them from unjust discrimination in their rates of toll and fare between individuals and communities; and that in several cases, and upon various occasions it has been held and said by eminent jurists, that a State Legislature has ample power to prescribe, regulate and limit the rates of toll and fare which the companies may lawfully charge and collect for the transportation of freight and passengers.

2. Railroads, whether built, owned and operated by the State, by corporations or natural persons, and whether their use is free, or only to be had upon the payment of tolls

and fares, are public highways; and being such it is within the legislative power of the State to prescribe and dictate the terms and conditions upon which their use may be enjoyed by the public.

The right of eminent domain will not authorize the sovereign power to take the property of a citizen, and transfer to any corporation public or private, for merely private purposes, and where the public interest will be in no way promoted thereby; and any attempt at such transfer where there could be no pretense of public utility would be held unconstitutional. On the other hand, a transfer of the property of one private citizen to another, compensation first being made, would undoubtedly be valid and constitutional, if the use of such property was for the public good. The nature or character of the person or corporation in whose behalf this sovereign power is exercised, is immaterial; the object, purpose and use are all important.

Highways are acknowledged to be of actual necessity; concerning this there can be no diversity of opinion; in fact their existence is so absolutely essential, that it is one of the first and highest duties of government to provide for their location and establishment, as the wants and convenience of the citizens demand, and any government failing in this, would fail in the discharge of one of its most important duties.

The object of the ordinary highway is to afford facilities for transportation of persons and property from one locality to another; the object of railroads is precisely the same; the highway is for the whole public; so is the railroad; and in order to secure to the public the full, complete, and legitimate use and enjoyment of these roads, both should, and must necessarily be, to a greater or less extent under the control of the State.

If railroads were in fact owned by the government, built, equipped and maintained at the public expense, and directly and completely under government control, the rights of the public to the use of such roads, in the way and to the extent that their character, construction and manner of operation will admit of, would be no greater nor more perfect than they now are. The great object of the government in creating them, or in authorizing their construction by corporations and individuals, is *public utility;* this was the controlling reason, the predominant motive that prompted and induced the government to lend the active exercise of a sovereign power in aid of this construction.

In Swan *vs.* Williams, 2 Mich., 437, the court, speaking of railways and common highways, said:

"The one is equally intended however to open good and easy communication with the other; *and so far as travel and the transportation of property is concerned, the public have the same rights in the one case as in the other*, with this difference, that the means are all varied with the mode of travel.

In Erie & North-East R. R. Co. *vs.* Casey, 25 Pa. St. 308, it is said by Black, J., that "*Railroads made by the authority of the Commonwealth* upon land taken under her right of eminent domain, and established by her laws as thoroughfares for the commerce that passes through her borders *are her highways.*"

In the West River Bridge Case, 6 How., 546, Woodbury, J., said, speaking of the exercise of the right of eminent domain, that:

"The user must be for the people at large, for travelers, for all, must also be compulsory by them, and not optional with the owners, must be a right by the people, not a favor, must be under public regulation as to tolls, or owned, or subject to be owned by the State, in order to make the corporation and object public for a purpose like this."

We have here the rule distinctly asserted, that whenever the use for which the property is required is so far public as to warrant the exercise of the right of eminent domain in its behalf, then such public use, of necessity, is for the people at large, and all the people, and that it is also compulsory, that is, the people can insist upon such use; that it is a right that may be enforced by the people, and is not in the nature of a favor, granted by the owners; and that the road must be under public regulation as to tolls.

The Supreme Court of Mass, speaking of the public character of railways, and the rights of the public respecting them, has said: "Highways, town ways and railroads *are to be regarded as public works*, introduced in their various modes, to promote the public accommodation."

And that, "It is manifest that the establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement.

* * * * *

It is true, that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public."

Newberry Turnpike *vs.* Easton R. R. Co., 23 Pick. 327.
Worcester *vs.* Western R. R. Co., 4 Met. 566.
See, also, Bloodgood *vs.* Mohawk &c. R. R. Co., 18 Wend. 9.
Pratt *vs.* Brown, 3 Wis. 613.
Louisiana, Cin. & Charleston R. R. Co. *vs.* Chappel, 1 Rice, 383.
People *vs* Salem, 20 Mich. 482.
Beekman *vs.* Saratoga & S. R. R. Co., 3 Paige, 45.
Chicago, Dan. & Cin. R. R. Co. *vs.* Smith, 62 Ills. 268.

And Vedder *vs.* Fellows, 20 N. Y. 131, where it is said that "railroads are public institutions, established by law, for public accommodation."

It is urged that ordinarily a company is not compelled to resort to the exercise of the power of eminent domain to procure the right of way for the road, but that in most instances the company can obtain the right by direct negotiation and contract with the owners of the land. From this, it is argued, that the company derives but little benefit from the State by the permission to exercise this sovereign right.

This argument, however, can have but little force, since it is very apparent that but for this right and power, one person alone, owning land over which the projected line may be located, could as absolutely stay all further progress in the prosecution of the work, by refusing, upon any terms, to grant the right of way, as would be the case, if the owners of all the land should join in such refusal.

It is because the State has granted the aid of its sovereign power to the company, that the company is enabled to successfully negotiate for the right of way with the owners. Not only so, but without this power, owners of land could, and in very many instances would, exact for the right of way, many times the actual value of the right and property granted; and thus, even if the company could negotiate for the privilege of constructing the road, it would be compelled to pay vastly more for the privilege, than when armed with the right to exercise this power. And it may be further observed, that without the aid of the legislature, the company could not even enter upon the property of others for the purpose of making a survey of the line for the contemplated road; not the first step could be taken, except by the active aid of the sovereign power; and it is therefore the extreme of folly to contend that such aid is insignificant, and of little value.

Not only has it been held that the use of railroads is so

far public as to warant the exercise of the right of eminent domain to aid in their construction, but it has also been held that they are so far considered by the courts as in the nature of improved highways, and as indispensible to the public interest, and the promotion of the general welfare, that a State legislature may authorize the direct exercise of the taxing power, one of the attributes of sovereignty, and never to be exercised except for public purposes and uses and in furtherance of public good, to aid in the construction of these works.

The ground upon which these decisions are uniformly based is, that the roads are public roads, are intended to supply a public need, are absolutely essential to the due progress of modern civilization, and imperatively demanded by the best interests of society and of the State.

In Sanford *vs.* Railroad Co., 24 Pa. St., 380, Lewis, C.J., said: "The power of the legislature to authorize municipal officers to tax the people of cities, boroughs, and counties for the payment of subscriptions to railroad corporations, has been sustained on the ground that *a railroad is a public highway for the public benefit.*"

And Dillon, J., in *Com. Bank vs. Iola*, 2 Dil. 361, speaking of the power to levy taxes to aid in the construction of railroads, said: "Therefore it is, that in favor of such improvements, the State may put forth its power to tax. That this act may lawfully be done, is because, and only because, *the use is a public one; public in its nature, and hence these works are subject to public control and regulation*, notwithstanding they may be constructed under legislative authority, and be exclusively owned by private persons or corporations."

It is well to note in this connection, that this opinion of the learned Judge, was expressed four years after that delivered by him when Chief Justice of the Iowa Supreme Court, in *Hanson vs. Vernon*, and from which counsel quote so extensively in their printed argument; and shows that he had surrendered his individual convictions to the uniform current of authorities; and that this occurred before the case at bar originated.

It is also well to note that at the time the case of *Hanson vs. Vernon* was argued and determined, nearly all the railway companies of the State, stoutly maintained the doctrine and united in the effort to convince the court of its correctness, that "railroads were simply improved highways, and that taxes in aid of their construction stood upon the same principle as ordinary road taxes." Since

then, however, they seem to have discovered the novel principle, or fact rather, that they are only public highways, for the purpose of receiving aid and benefit from the State, and are not such when the sovereign power is exerted to their supposed injury or detriment.

As showing the marked distinction in the principles applied to the property of railroad companies, and those applied to the property of individuals, on account of the public character of railways, the case of *Kennedy vs. Mil. & C. R.R. Co.*, 22 Wis. 554, is worthy of attention. In that case the railroad company had located its line over land previously mortgaged, and made an agreement with the owner of the equity of redemption as to the amount of compensation to be paid, paid the amount agreed upon, and received from him a conveyance of the right of way and constructed the road thereon, but failed to make any arrangement with the mortgagee. In the suit to foreclose the mortgage, the mortgagee insisted that the mortgage covered and included not only the right of way, but the superstructure and track. The court, however, held differently, and said: "It is a familiar rule that all buildings erected and fixtures placed upon mortgaged premises by the mortgager becomes a part of the realty, and, so far as they enhance the value of the estate enure to the benefit of the mortgagee. * * * * *

When we consider the nature of the rights vested in the railroad company by its charter, the purposes for which these rights, are conferred by the Legislature *and the great interest the public has in the successful operation of the road*, it seems to us that all the rules and analogies of law which control as between individuals, cannot be strictly applied to such a corporation. * * *

In the event the mortgage should be enforced, it seems to us that all equity requires the company to do is, to make compensation by paying the value of the land at the time it was taken and interest on that amount."

Ordinarily the mortgagee has the right to insist that his mortgage shall hold all improvements, having the character of fixtures, placed upon the mortgaged property by the mortgagor or those claiming under him, unless there is an agreement to the contrary.

This court in *Olcott vs. Supervisors*, 16 Wall. 678, held that a railroad is a public highway; that though the ownership be private, the use is public; and that though it be built by a private corporation, it is an act done for a public use. The following language is used in the opinion:

"The question now is, whether if a railroad, built and owned by a private corporation, is for a public use, because it is a highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate, it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. Taxation for such purposes has been immemorially imposed. When therefore, it is settled, that a railroad is a highway for public uses, there can be no substantial reason why the power of the State may not be exerted to tax in its behalf. It is said that the railroads are not public highways *per se;* that they are only declared such by the decisions of the courts, and that they have been declared public, only with respect to the power of eminent domain. This is a mistake. *In their very nature they are public highways.*"

In R. R. Comrs. vs. R. R. Co., 63 Maine, 269-275, it was said by Dickerson, J., that: "The requirement for the payment of fare does not, by any means conflict with the right to public use. the corporation upon the payment of the fare, is under the same obligation to render the required service for the public, that the State would be, if railroads were free and conducted by State authority. *Nor does the ownership of railroads, whether it be in the State or a private corporation, affect the nature of their use, since in either case the functions to be exercised and the uses to be subserved are public.* * * * *And whether the corporation, the public, or the State, have authority under the charter to put on and use rolling stock, the use of the road is nevertheless public.*"

It is unnecessary, however, to multiply the citation of authorities upon this question, as with scarcely a single exception, they all concur in holding and recognizing to be correct the doctrine, *that railways are public highways.*

We submit that, if it be true, as we think has been abundantly shown, that railways are public highways, and that the public have the same right to demand and insist upon their use, that they have in relation to ordinary highways; and that they have an interest in them as clearly as they would have if they were free, or as if the tolls were payable to the State; that if the main object in authorizing their construction was to supply a public want, to accommodate the public convenience, to further the public interests and to promote the public welfare; that if it is the duty

of the individuals or corporations who own them to furnish the public all reasonably necessary facilities for the use of their railways, and if this right to such use is compulsory and not optional on the part of such owners, then it follows that there exists on the part of the puclic a right, coupled with ample power, to enforce the performance of those duties by the owners, which are necessary to enable the public to enjoy and receive the benefit of those rights, to which the law declares them entitled.

If the law enjoins upon the owners of railways the discharge of certain duties respecting their actions and relations with the public, there must necessarily exist on the part of the public the correlative right to insist upon such discharge of duty ; otherwise the duties would be such in name and not in fact; would be merely moral and not legal duties.

Now, one of the duties of a railroad company is to furnish to the public reasonably ample and convenient facilities, for the transportation of persons and property, for a reasonable compensation, and if this be refused to the public, then the company has failed in the discharge of its duty, the public has been deprived of the enjoyment of a right, to which by law it is entitled, a public wrong has been done, and it certainly needs no argument to show that the power to furnish a full and ample remedy should exist somewhere ; and we submit that no such remedy can be furnished except by the legislative power.

It is through the action of the legislature that the right of eminent domain is exercised, and without which the roads cannot be constructed; it is through legislative action that the taxing power is exercised, by which great and material aid is furnished by the public; and we urge that it is legitimate to insist, that these railways, that can have no existence except by permission of the sovereign power, that cannot be constructed except through the active interposition of that power; that, by the aid of the taxing power one of the attributes of sovereignty, are enabled to levy unwilling and involuntary tribute upon whole communities, to aid in their construction, shall be subject to such regulations as to those matters which concern the public, as this same sovereign power shall deem to be necessary to promote the common welfare, and to secure the enjoyment of public rights.

We cannot understand how this public use can be permanently secured to the people, except by subjecting the companies to the control of the General Assembly, in which is vested all the legislative power of our State sovereignty.

It is idle to talk about obtaining any adequate remedy by civil suits at law to enforce individual rights. The corporations can with impunity set at defiance any efforts in that direction. If a person is charged an unreasonable and exhorbitant sum for transportation of himself or his property over any road, it is ordinarily a matter of economy for him to pay the charge, and suffer the wrong, than to undertake to insist upon his rights.

In the first place, the fare is demanded in advance, and must be paid before the service is rendered; a refusal to pay the sum exacted, results in a refusal of the company to render the service, and this refusal compels the person to abandon the desired use of the road until such time as he can by an ordinary action at law assert his rights; ordinarily a period of months if not years. It is thus evident that he cannot afford to refuse to pay the charges.

The alternative is to pay the sum demanded, under protest, and then bring suit to recover the excess paid over a reasonable compensation. This sum ordinarily amounts to but a few dollars in each case to each individual, and it thus becomes absolutely certain, that litigation will result in the expenditure of a much larger sum than that extorted from him in the first instance.

The certainty that litigation will necessarily be attended with large expense, the loss of time involved in looking after the case, the gerat difficulty of establishing in court, by sufficient and competent evidence, just how much is or is not a proper and reasonable compensation, the vexatious delay, and many other reasons that will readily suggest themselves, all combined, demonstrate how impracticable, if not utterly impossible it is to secure, by the means of an ordinary suit at law, anything like an adequate remedy for the wrong inflicted by the unjust and illegal exaction and extortion

Even when a case has been determined, no matter with what result, no material progress has been attained in the establishment of any principle that shall guide and operate to control the companies in their future conduct and relations with individuals or the public, since the determination of one case cannot be pleaded or shown in another, but each case must depend upon and be determined by the facts attending it, even though such facts may in character be substantially like those of all similar cases, involving the same principle. It follows then, that in every instance the same expensive and tedious road of litigation must be pursued, with the same unprofitable result. In view of

this, it is an insult and a mockery to say to the injured public that the enforcement, in the judicial tribunals of the land, of the recognized principles of the common law, affords anything like an adequate remedy for the wrongs continually and persistently perpetrated by many railroad companies upon all who are compelled to patronize them.

The only adequate remedy is by proper and discreet legislative control over the charges permitted to be made, and the enforced compliance with such law, by fixing such penalties for the violation thereof as will certainly deter the companies, their officers and agents from willful violation of any of its provisions.

3. The complainant is a common carrier, and the legislature has the power to establish and prescribe the terms and conditions upon which it may be lawful for complainant to pursue its employment or business as such common carrier.

The employment of a common carrier is public in its nature, and the person entering upon such employment assumes the discharge of public duties, and must perform these duties.

It was said, in *Coggs vs. Bernard*, 2 Ld. Ray., 917, that a common carrier exercises a "*public employment.*"

In *Ansell vs Waterhouse*, 2 Chitty. R., 4, it was said by Holroyd, J.: "This is an action against a person, who, by ancient law, held, as it were, *a public office*, and was bound to the public."

It was said by the court, in *Hollister vs. Nowlen*, 19 Wend., 239, that: "A common carrier exercises a *public employment*, and, consequently, has public duties to perform. He cannot, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price he chooses to demand."

Lewis, C J., speaking for the court, in *Sanford vs. Railroad Co*, 24 Penn., 380, 381, says: "The nature of this peculiar and improved class of highways, makes it indispensible to the public safety that the transportation on it should be placed under the strict regulation of one controlling head This necessity has led to the usual grant of power to provide cars, locomotives, and to embark in the business of transportation of freight and passengers. *When this power is assumed*, the company becomes a common carrier, *and then exercises a sort of public office, and has public duties to perform*."

In *New Jersey Nav. Co. vs Merchants' Bank*, 6 How., 382, the following language is used, in relation to a com-

mon carrier: "He is in the exercise of a *sort of public office*, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned."

The same doctrine was approved by the court, in *Chicago & N. W. R'y Co. vs. People*, 56 Ill., 365.

In *Gray vs. Jackson*, 51 N. H. 9, the language of the court is: "The defendants have taken upon themselves the *public office, trust and duty of common carriers*," &c.

And in *McDuffee vs. R. R. Co.*, 52 N. H. 430, 448, the same court said, speaking of a common carrier: "He engages in a *public employment, takes upon himself a public duty, and exercises a sort of public office.* * * It is for him to consider as well the duty, as the profit, of *being a public servant*, before embarking in that business."

If the employment of a common carrier is public, if his duties are public, if he is a public servant, if he exercises a public office, there can be no more proper or legitimate subject for legislation, nor one more urgently requiring action, than that which consists in establishing and defining the duties of such public office and employment, and prescribing and imposing the terms and conditions upon which the public shall have the right to insist upon the performance of such public duties.

It is the duty of the legislature to see to it that the public are furnished the means and facilities whereby it may be protected from unjust and arbitrary terms, fixed and established by these public servants; if it fails in so doing, it fails in the discharge of one of its most important duties; for certainly nothing can be of more importance to the people of the State than the right and privilege of easy and rapid transit from one locality to another; and if those engaged in the business of general transportation, in a way that has, of necessity, expelled from existence all possibility of competition, can prescribe and establish their own terms for such transportation, it is folly to speak of a right on the part of the public to insist upon being served and accommodated by those engaged in such business and employment; an employment that is public, and for the public benefit, and yet which the public can only use upon such terms as those engaged therein may arbitrarily establish, is a delusion. It is an absolute and unqualified misuse of terms to designate such an employment "public," or to say that a person so employed has any "public" duties to perform, or that the "public" have any rights in relation thereto, which can be enforced.

4. If it be true as zealously contended on behalf of complainants, that the act in question is a regulation of commerce, then so far as relates to the internal commerce of the State, the act is entirely within the legitimate exercise of legislative powers.

All legislative power was originally vested in the people in their sovereign capacity, and this power is in all instances retained by the people of the several States, except where expressly granted to the federal government. And so far as the regulation of commerce is concerned, the only power or right granted to the federal government is, the power to regulate commerce with foreign powers, and among the several States, and with the Indian tribes. This act is not a regulation of commerce with foreign powers, nor with the Indian tribes, nor is it entirely a regulation of commerce among the several States, although being general in terms, it applies to inter-State commerce; still being general, it also applies to the internal commerce of the State. It would seem to be clear that, the regulation of internal commerce being among the reserved powers of the people of the several States, the act, being as is alleged, a regulation of commerce, and therefore, of necessity, a regulation of internal commerce, must certainly, so far as it is a regulation of internal commerce, be within the legislative power of the State.

Not only would this seem to be so upon reason, but it has frequently been so held.

Thus, in *Gibbons vs. Ogden*, 9 Wheaton, 203, it was said by Marshall, Ch. J, that: "They(inspection laws) form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, *as well as laws for regulating the internal commerce of a State*, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

In the *License Cases*, 5 How. 574, it is said by Taney, Ch. J., that: "It is equally clear that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations and among the several States; *and that beyond these limits, the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every State, therefore, may regulate its own internal traffic*, according to its

own judgment and upon its own views of the interest and well-being of its citizens. I am not aware that these principles have ever been questioned."

It was said in the License Tax Cases, 5 Wallace 470, as follows: "But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States."

But it can scarcely be necessary to cite authorities upon this point. It is beyond all question, entirely competent for a State to regulate its interal commerce, and the power so to do, is ample and plenary; in fact is exclusive.

Whether the act is, or is not, a regulation of commerce, it is not proposed to discuss in this connection; but certain it is that if it is so, then the conclusion is inevitable that the Legislature by its enactment, did not exceed the limits of its legitimate functions. And it is equally true that, if it is not a regulation of commerce, then the act does not violate the provision of the federal constitution, which confers upon Congress the power to regulate inter-State commerce.

But it is said that if the legislature may limit and restrict the rates of charges, it may exercise this power to the extent of prohibiting any charges at all, or at least may so limit them as to prevent the companies from charging compensatory rates.

To this it may be answered that:

1. *The rates fixed by this law are compensatory and reasonable*, and therefore it is not material what would be the result if the contrary were true. So entirely satisfied were the complainants, that they could not establish the alleged fact, that the law does not permit just and reasonable charges, that they entirely abandoned that part of the case, and offered no evidence whatever in support of that averment. It should, therefore, be excluded from consideration, as having no proper place in the case

2. The fact that a legislature may abuse its discretion and power furnishes no objection to the exercise of such power. All power whether vested in the executive, legislative or judicial department of the government, is liable to abuse; but if such fact afforded any legal ground for objection to the existence or exercise of that power, there would be an end to all government. Justice McLean, in the License Cases, 5 How., 591, said in relation to this, that: "Will it be contended that the legislature cannot exercise

the power, because it may be exercised beyond the proper limit? This logic is not good when applied to the practical operations of the government. The argument is, power may be abused, therefore it cannot be exercised. What power dependent on human agency cannot be abused?"

IV.

If the charter of the Burlington & Missouri R. R. Co. contained a provision purporting to confer upon that company the exclusive right to establish its rates of tolls and fares, such provision would be invalid, for the reason that it is not competent for a legislature, by contract, to divest itself and all future legislatures of the power to legislate for the public good.

We have attempted to show that it is within the legitimate domain of legislative power to regulate tolls and fares by statute. We have also attempted to show that, having the power, it is the duty of the legislature, by the discreet and prudent exercise of it, to so legislate that the rights of the public and of the people will be preserved and secured, and the performance of the duties of the railroad companies certainly enforced.

We believe that it is not competent for the legislature to divest itself of these powers; they are part of the governmental power inherent in sovereignty, and under our constitution vested in the General Assembly, to be exercised when, and as the public good, peace and prosperity require: and that any contract or agreement made by the legislature, whereby the legislature has seemed to divest itself of the right to exercise any portion of governmental powers that are essential to good government, and to the establishment and enforcement of the rights of individuals, and of the public, is absolutely void.

The General Assembly holds this power by virtue of the constitution, in trust for the benefit of the people, and to be exercised whenever and wherever the public good may require, and not for the purpose of farming it out or bartering it away to individuals or corporations, other than those organized for municipal purposes.

If it may, by contract, permanently exempt one person or corporation from liability to be controlled by or subjected to such laws as the good and prosperity of a well organized society demand, then with equal propriety may it exempt in a like manner, and under like circumstances, any and all individuals and corporations; and thus the sovereign power may be placed entirely beyond the possibility

of further exercise, and the government thus substantially abolished by contract—a result too absurd for serious consideration.

It was said by Woodbury, J., in *East Hartford vs. Hartford Bridge Co.*, 10 Howard, 534, speaking of the duties of a legislature that: "It can neither devolve these duties permanently on other public bodies, *nor permanently suspend or abandon them itself*, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.

It is also bound to continue to regulate such public matters and bodies, as much as to organize them at first. When not restrained by some constitutional provision, this power is inherent in its nature, design and attitude; and the community possess as deep and permanent an interest in such power remaining in, and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess, in restraining it. * * * Its members are made by the people, agents or trustees for them on this subject, *and can possess no authority to sell or grant their power over the trust, to others.*

Nor can the public be estopped by such attempts, since the acts of their agents are to be for the public, and for its benefit, and not for themselves individually, and are under a limited authority or jurisdiction, so as to be void if exceeding it."

In Thorpe *vs.* R. & B. R. R. Co., 27 Vt., 149, it is said that: "When the regulation of police of a city or town, by general ordinances, is given to such towns and cities; and the regulation of their own internal police, is given to railroads to carry into effect their by-laws and other regulations, it is, of course always, in all such cases, subject to the superior control of the legislature. *That is a responsibility which legislators cannot divest themselves of, if they would.*"

In the case of O. & M. R. R. Co. *vs.* McClelland, 25 Ill., 142, it is said by the court that: "Government would cease to be of any great value, if it were to disarm itself, by grant or otherwise, so as to be unable to exercise the power and perform the duty of protecting its citizens in the rights, to secure which, government was organized. If these powers were irrevocably yielded by the government to irresponsible corporations, that result must inevitably ensue."

In Butler *vs.* Pennsylvania, 10 How., 416, it is said by the

court, in speaking of the contracts intended to be protected by the federal constitution, "The contracts designed to be protected by the tenth section of the first article of the constitution, are contracts by which *perfect rights, certain, fixed rights of property*, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. * *

"They are functions appropriate to that class of powers and obligations, by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, *if indeed, they can under any circumstances be justified in surrendering them.* This doctrine is in strictest accordance with the rulings of this court in many instances, from amongst which may be cited its reasoning in the important and leading cases of the Charles River Bridge in 11 Peters 420, and the State of Maryland *vs.* The Bal. & O. R. R. Co., 13 How. 534, *to which might be added other decisions upon claims to monopoly, as ferry privileges, in restraint of legislative action for public improvement and accommodation.*"

"It would seem," says Mr. Cooley in his treatise on Constitutional Law, 283, "therefore, to be the prevailing opinion, and based upon sound reason, that a State cannot barter away or in any manner abridge or weaken, any of those essential powers, which are inherent in all governments, and the existence of which in full vigor, is important to the well-being of organized society; and that any contracts to that end cannot be enforced under the provision of the national constitution now under consideration."

See also Goszler *vs* Corporation of Georgetown, 6 Wheat. 596. Brick. Presby. Church *vs.* Mayor, &c., of N. Y., 5 Cow. 538. People *vs.* Morris, 13 Wend. 325. The West River Bridge Co. *vs.* Dix, 6 How. 507.

We are aware that the Supreme Court of the United States has finally determined that a charter of a corporation containing a provision exempting its property from taxation, is a contract that can be enforced by such corporation. But we can readily perceive a clear difference between the taxing power, and the general police power of the legislature in this respect. The former is for the purpose of obtaining sufficient revenue to defray the expenses of the government. and it may well be that the State can without

public injury, relinquish to an individual or corporation, the right of taxation, upon receiving an equivalent consideration for the benefit which would have accrued from an exercise of the power or right relinquished.

This is simply exchanging one method of raising money or revenue, for another. The right to tax, is merely the right to compel the payment of a sum of money for the public benefit; and if this sum of money, or its equivalent is received in some other mode than by a levy of taxes, it would seem that there could be no possible detriment result to the government thereby.

The power of the Legislature, however, to disarm itself and the government, of the right and power to enact such laws as are essential to the health, peace, comfort, happiness and prosperity of society, is an entirely different matter.

Would it be competent for the Legislature to authorize a corporation to construct a railroad, and operate it without regard to the safety of the persons or property being transported thereon, or of the community through which it would pnss ?

Or would it be competent, by a provision to that effect inserted in the charter, to provide that a railroad company should not in any event, nor under any circumstances whatever, be made liable for any damages, arising from actual negligence of the grossest kind ?

Could the company insist that by a chartered right, it was empowered to utterly disregard the safety and well-being of the public ; and that it had a chartered right to convert its road into a common nuisance, instead of causing it to be a public benefit ?

We doubt not that all these questions will be answered in the negative; yet why they may not as well be answered in the affirmative, if the general supervisory and police power of the Legislature may be bargained away or even substantially abridged, is more than we can comprehend.

It was competent for the Legislature to authorize the company to take private property for its right of way, because it was for a public use; but if the company stipulated in its charter, for the right to fix the rates of fares and tolls, exempt under all circumstances, from legislative control or regulation, then by so doing, it stipulated for the right to fix the fare at such extortionate and unreasonable rates, as to actually and necessarily exclude the public from the use and benefit of the road.

If such a result can be accomplished, then what becomes

of the constitutional provision, that private property shall only be taken for *public use?* It would be no answer to say, that the road still remained open to the public, so long as the rates of fare remained so great as to preclude the possibility of the use of it by the public.

We do not maintain that it is competent for Legislature to deprive the company of its right and franchise to take reasonable compensation for transportation of passengers and freight, by any means, We do, however, contend that it was not competent for the legislature, when it granted the charter to the B. & M. R. R. Co., to deprive itself of the right and power by appropriate subsequent legislation, to compel the company to adopt such rates, as would secure that beneficial use of the road which the public had the right to reasonably expect and demand.

If the road was intended to be a highway, and was authorized to be constructed because the public convenience, accommodation, and necessity so required, if the Legislature could only grant the right to construct it, because it was or would be required for public use, (all of which we believe we have fully demonstrated,) then it seems to us that it unquestionably follows, that it was not competent for the Legislature, in the very act in which the right and power to build the road, was granted to the company to disarm itself and all future legislatures, by contract, of the power to enact such legislation as should be imperatively demanded, to secure and preserve to the public, the object and purpose designed and contemplated to be accomplished by that grant.

Would a legislature be permitted to contract with a corporation not to exercise over its property the right of eminent domain, and thereby bind the State in perpetuity not to enter upon any public improvement, no matter how urgent the necessity, that would make it necessary to call upon such corporation, to make the same surrender of the ownership and control of its property that is demanded of others? Could a legislature thus practically stay the progress of improvements, by authorizing the construction of a railroad across the State in one direction, which should for all time constitute an insurmountable barrier to the construction of any road, even a highway, across the State in an opposite direction, or in any direction that would make it necessary to intersect the first mentioned road, and this, even though the pressing necessities of a majority of the people of the State seemed to absolutely demand the construction of the other improvements? We do not believe

these things can be, yet we do not see why such or similar results would not really follow, if the Legislature of a State may alienate those sovereign powers, the constant and continued exercise of which is essential to the promotion and security of the public good, welfare and happiness.

In ordinary cases the injury resulting to the public from improvident or unwise legislation is but temporary in its character, and the wrong can be readily remedied by a succeeding legislature; but if a legislature can convert the sovereign powers of the State into an article of trade and commerce, and, with or without any consideration, obligate the State never to exercise its sovereign powers over any individual or corporation, then, indeed, can it perpetrate a wrong, permanent in its character, and which is fraught with evil, and evil only, the magnitude and extent of which it is difficult to entirely comprehend, impossible to overestimate, and for which there cannot be, so long as the government shall exist, any adequate or proximate remedy.

If the attributes of sovereignty, which are essential to the existence of government, and the exercise of which by the rightful power is necessary to the preservation of the prosperity and happiness of a well ordered society, may be alienated or substantially abridged and weakened, then it seems to us that the avowed object and purpose for which government is established may be readily and effectually defeated.

V.

In accepting from the State the land granted by the federal government to aid in the construction of railroads in Iowa, the Bur. & Miss. River R. R. Co. expressly stipulated that it would at all times be subject to such rules and regulations as the General Assembly of the State should enact; and thereby the company surrendered whatever exclusive right it had previously possessed to fix its own rates of fares and tolls.

In May, A. D. 1856, Congress made a grant of lands to Iowa, "to aid in the construction of certain railroads in said State"; and one of the roads designated in the act making the grant was one "from Burlington on the Mississippi river, to a point on the Missouri river near the mouth of Platte river."

In July, 1856, the State, by an act of the General Assembly, granted to the Bur. & Miss River R. R. Co. so much of said lands as were granted to aid in constructing

a road from Burlington to a point on the Missouri river near the mouth of the Platte. The act by which land was granted to the railroad company, contain the following provisions, viz:

SEC. 14. Said railroad company accepting the provisions of this act, *shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the general assembly of Iowa*, not inconsistent with the provisions of this act, and the act of congress making the grant.

SEC. 13. The said company shall assent to and accept the provisions of this act, by a written instrument, under the seal of such corporation, with the signatures of the proper officers, within ninety days after the passage of this act, which said acceptance shall be filed in the office of the secretary of state, and be by the secretary recorded in the book kept by him for the recording of articles of association."

See sections 1311, 1310, Revision of 1860.

The railroad company, on the 3d of Sept. 1856, adopted the following resolution, viz:

Resolved, That the act of the General Assembly of the State of Iowa, approved July 14, 1856, entitled "an act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act entitled, 'an act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' *

* *be, and the same is hereby accepted by this company*, and all the provisions of the same are hereby assented to."

This resolution of acceptance, properly signed and attested, was filed in the office of the Secretary of State, Sept. 6, 1856—p. 37, printed record.

The articles of incorporation of the company provided that the board of directors are "authorized to make any arrangement which is suitable and proper with the State of Iowa for the purpose of securing the benefit of any lands which may be given to the State for the construction of the road. Art. 12, p. 15, printed record.

It seems then, that the company, at the time of its first organization, anticipated that congress would make a grant of lands to the State to aid in the construction of a railroad from Burlington to some point on the Missouri river, and therefore in its charter inserted an article expressly authorizing its directors to make any "suitable and proper" arrangements necessary to secure the benefit of any such

grant when made. It further appears that a grant of land was subsequently made to the State, and that "for the purpose of securing the benefit" of the land so granted, the company, through the action of its board of directors, agreed to accept of said lands with the condition attached, that the company would "*at all times be subject to such rules and regulations as might from time to time be enacted and provided for by the General Assembly of Iowa.*"

It is impossible for the general assembly of Iowa to "enact a rule or regulation," without enacting a law; in fact, every enactment must necessarily be a statute.

The constitution of Iowa, in force in 1856, at the time of the legislation in question, contained the following provision, viz:

"The legislative authority of this State shall be vested in a Senate and House of Representatives, which shall be designated the General Assembly of the State of Iowa; and the style of their laws shall commence in the following manner: *Be it enacted, by the General Assembly of the State of Iowa.*"—Art. 3, old Constitution; Code of 1851, p. 546.

From this it is evident that all legislative authority was, by the constitution, vested in the General Assembly, and that all laws must have the enacting clause of, "*Be it enacted,*" &c.; and it would therefore seem to follow, that every enactment of the General Assembly must necessarily be a law, and hence that a "rule enacted by the General Assembly" must be a law enacted by that body; for certainly nothing but a law was, by the constitution, required to have this enacting clause; nothing but a law is an enactment, and every enactment is a law.

The provision, then, that required the company, in accepting the provisions of the land grant, to be "subject to such rules and regulations as may, from time to time, be enacted," &c., is to be construed, and to have the same effect, as though it read, "subject to such laws as may, from time to time, be enacted," &c.

If this be correct, then the company became subject to such laws as should be enacted by the General Assembly, and complainants succeeding only to such rights as the original company possessed, are subject to the law in question, unless, indeed, it can be shown that the "rules and regulations" named in the land grant act, only include, or were only intended to include, a certain class of laws.

No argument, certainly, is necessary to convince the understanding that the legislature of Iowa intended to re-

serve or secure to itself, beyond all doubt or question, the undisputed right to control, to some extent, at least, the companies that should accept of the grant, and that such control was to extend to and include that which, up to that time, had been considered debatable ground. Most assuredly, the legislature did not intend, by the insertion in the act of an entire section, a section containing no other provision, and referring to no other subject matter, to solemnly and gravely stipulate for the exercise of a right or power that had never been questioned.

A reservation of a power that had never been granted, that was not about to be granted, and that could not be granted, is no reservation at all. Such a construction renders the provision completely nugatory, and must be resorted to, if at all, it would seem, for the purpose of reaching a desired result, and not because it appears to be the legal and natural meaning of the words used.

Why should it be considered necessary or proper to apply a construction that leaves the provision entirely useless and meaningless?

The force of these suggestions has been felt by counsel for complainants, and to avoid, or turn it aside, it is contended that in the charter, the legislature "had very improperly conferred on the railroad company the right to make the 'rules and regulations' for the management of their business," and by this provision in the land grant act, sought to regain the power which had thus been previously granted away. The provision in the general incorporation act, here alluded to, is that which gives the corporation power "to establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs, *in accordance with law*, and not incompatible with an honest purpose."

By the insertion of this provision in the general incorporation law of the State, a provision commonly inserted in all charters, and which, in fact, conveys no power which the corporation would not possess without it, it is insisted that the legislature yielded to the company the entire police jurisdiction over the company, the road, and its operation. If this be true as to this company, then it is equally true as to all railroad and other corporations, organized under this law; and when it is remembered that in Iowa all corporations have been and are organized under this general law, containing this particular provision, it will at once be seen that if this position of counsel be correct, then all corporations for pecuniary profit existing in Iowa, are com-

pletely beyond the supervisory and police power of the legislature.

Conceding this to be true, and every croporation within the State is a sovereign power within itself, clothed with the attributes of sovereignty; is above and beyond judicial or legislative supervision or control; higher than the people; more powerful than the State that gave it existence; an *imperium in imperio.*

A proposition leading to results so certainly fatal to the beneficial exercise of the sovereign powers of the State, cannot possibly be well founded.

A very brief examination of the general incorporation law, will demonstrate the utter want of any shadow of warrant for such a theory.

1. The very provision relied upon as the basis of this theory, contains a clause, that the rules and regulations made by the corporation must be "in accordance with law." Now it is preposterous to say that a regulation which knows no law, and is subservient to no law, "is in accordance with law." To be in accordance with the law, is to be in harmony with it, and to recognize its superior importance and controlling power. If there is an accord between the regulation of the corporation and the law of the State, then there is no conflict between the two; for no conflict can exist where there is no difference and no dissimilarity. To the end then, that the regulation shall be in accordance with the law, it is essential that the provisions of the former shall correspond with, and in no respect be repugnant to the other. And not only so, but it is essential that the law shall be taken as the standard and measure, by which to judge of the regulation, since otherwise the law is forced to accord with the regulation, instead of the regulation being in accordance with the law. Whenever a difference exists, whenever a conflict arises, the law of the State is supreme, and the rule of the corporation yields to this supremacy. In this manner only can it in any proper sense be said that the latter is "in accordance with the law."

2. Attention has been called in a previous part of this argument to that provision of the general incorporation act which provides that "Such incorporation confers no power or privilege not possessed by natural persons except as hereinafter provided." Sec. 673, Code of 1851. Now it is very evident that a natural person possesses the power to make all rules and regulations deemed by him expedient for the management of his affairs; hence the provision giving the corporation power "to make rules and regula-

tions" only gives the same power that a natural person possesses in the management of his affairs. But a natural person is subservient to the law, and over him the legislature can exercise unlimited and unqualified police and supervisory power; and this being so, and the incorporation act giving to the corporation no power to make rules and regulations which the natural person does not possess, the conclusion is irresistible that, as the one is subordinate to the legislative power so also is the other. If the corporation is not subject to the police or governmental power of the legislature, then neither is the natural person; and if neither natural persons nor corporations owe obedience to the sovereign power of the State, the domain of legislation must necessarily be very limited; in fact, practically, legislation would seem to be almost entirely useless

3 The rule recognized by all authorities is, that the rules which corporations may legitimately make can only relate to their own internal affairs, and can in no measure, nor to any extent, either restrict or enlarge those rights and duties that arise out of, and are connected with, the relations existing between themselves and the public.

Thus in Seneca Bank *vs.* Lamb, 26 Barb. 595, it appeared that the charter authorized the directors "to make and prescribe such by-laws, rules and regulations as shall be needful," etc; and the court in construing it said: "It is limited in the authority it gives to the making of by-laws, rules and regulations to operate upon and control the internal conduct of the business of the bank; to restrain and direct its own officers and servants in the management of its affairs, *and not the publie at large, nor the rights and interests of third persons.* If allowed to have an operation beyond this, its validity cannot be for a moment sustained. *The legislature cannot confer upon a moneyed corporation power to enact by-laws contravening, repealing or in any wise changing the statutory or common law of the land.*"

See also, Sayre *vs.* Louisville, etc., 1 Duvall 144; Kenebeck R. R Co. *vs.* Kindal, 31 Maine, 470; Dunham *vs.* Rochester, 5 Cow., 462; People *vs.* Medical Society, 24 Barb. 570; Mech. and Farm Bank, 19 Johns., 115; Ang. & Ames on Corp., Secs. 334, 335, 359; 2 Kent, 296. There is clearly no warrant for this construction in the act of incorporation.

In *Hamilton vs. Dillon*, 21 Wall. 73, 92, it is said by Bradley, J., that: "It is conceded that in many cases, the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form, and time and circumstance, and not to substance. But it

must also be conceded that in other cases the power is much more extensive and substantial." Applying this principle, so well stated, to the matter in hand, and it becomes very plainly manifest that the power of a corporation "to make rules and regulations," by no means corresponds with or equals the power of a legislature "to make rules and regulations." The Legislature of a State is armed with the attributes of sovereignty, is the depository of all legislative power, and this power, restricted only by constitutional provisions, is suppreme and plenary in respect to all legitimate objects of legislation.

Not so, however, with a corporation, which, as an incident to its corporate existence, has the power to make such by-laws, rules and regulations not inconsistent with law, as are necessary to the management of its business. A grant of such a power, which the corporation would posess without an express grant, only confers upon the corporation the power to make such rules in accordance with law, as are necessary to enable it to accomplish the objects of its creation, and to manage its internal affairs. The grant of a power to an artificial body, a creature of the statute, and possessing inherently only limited rights and powers, is certainly not as exclusive, comprehensive and plenary as the grant of power to a sovereign branch of the government; even though the grant in each case be clothed in the same language.

And in this connection it may be well to observe, that the rules and regulations which the corporation may make, must at all times be *in accordance with law*, while the power of the legislature is only limited by the constitution.

It is, however, scarcely necessary to pursue this subject further, as it must be clearly evident that the Legislature did not in the act of incorporation grant to the company any general powers of legislation, nor surrender any portion of its police jurisdiction over the road or the company.

It is substantially conceded in the argument of the complainants' learned counsel, that if the clause in the land grant act, had provided that the company should "at all times be subject to such rules and regulations" respecting the rates of fares and tolls to be charged "as may from time to time be enacted," &c., by the General Assembly, then the lesgislature would have a right to regulate and prescribe such rates. But such a provision would have been far more limited, than that actually contained in the law; since now the provision is not either in terms, nor by implication limited to any particular object or subject, but is

as general and comprehensive as language can express, while with the limitation suggested, the General Assembly could only enact such rules in respect to fares and tolls.

A grant of a general power to make rules and regulations, must certainly include all special and particular powers, else the grant is not general. The only limitations expressed in the grant or stipulation, are, that the rules and regulations to be enacted must not be inconsistent with the land grant act, and the act of Congress, making the grant; and the expression of these limitations is conclusive that no other limitations were intended or implied, except those expressed. If this be not so, then no useful purpose was accomplished by expressly specifying certain limitations and exceptions.

In regard to the construction and interpretation to be placed upon the power "to make rules and regulations," it was said, in Hamilton *vs.* Dillin, *supra*, that: "Thus, in the constitution, the general powers 'to regulate commerce,' 'to establish a uniform rule of naturalization,' 'to make all rules and regulations respecting the territory or the property belonging to the United States,' are understood to give plenary power over those subjects. The power to regulate commerce has been held to include the power to suspend it; and the power to make rules and regulations respecting the territory of the United States, has been held to include the power to legislate for and govern such territory, and establish governments therein. The extensive effect given to these clauses is undoubtedly largely due to the character of the instrument, and that of the donee of the powers, to-wit: the legislature of the United States, to whom the grant of a power means the grant of a branch of sovereignty."

If so extensive an effect be given to these clauses in the constitution of the United States, which confer powers upon Congress, it would seem that an equally broad effect should be given to the clause in the statute under consideration, which confers upon, or rather reserves to the State legislature, power to legislate upon and over certain subjects. Not only upon reason and authority does the clause under consideration seem to be sufficiently comprehensive to authorize the legislature to limit and restrict the company in its rates of tolls and fares, but it is asserted in complainants' bill that the legislative tariff act is "a regulation of commerce among the States." Here, then, is an explicit and unqualified admission that the act is a "regulation;" and, if a regulation, then upon what ground can it possibly

be maintained, that the power to "enact rules and regulations" is not sufficient to justify the enactment of this particular "regulation?" And not only is it asserted that the law is a regulation of commerce, but it is insisted that because it is such a "regulation," therefore it is in conflict with the clause of the constitution, which confers upon Congress power to "regulate" commerce among the States. And so the anomalous position is assumed, on behalf of the complainants, that this tariff act is not a "regulation," within the meaning of the land grant act, which expressly subjects the company to "such regulations" as the General Assembly of the State of Iowa may, from time to time, enact; but, at the same time, sufficiently possesses all of the elements and characteristics of a "regulation," to be clearly within the power conferred upon Congress to "regulate" commerce. It is submitted that complainants cannot successfully "blow hot and cold" in one breath; one theory or the other must be abandoned; and the admission of the theory, that the law is a regulation of commerce, and is therefore unconstitutional, so far as it relates to inter-state commerce, unavoidably leads to the conclusion that Congress, under the power to "regulate" commerce, may enact a law in reference to inter-state commerce, similar to the one under consideration. And if this be true, it is not exactly clear why the State legislature may not, under the power "to enact rules and regulations," enact the statute in question, so far as its provisions are applicable to the internal commerce of the State.

If in either instance the word "regulate" had been used to confer a right or privilege upon a legislative or other body possessing limited power, there might be reason for holding that it should havea more restricted meaning in the one case than in the other. This, however, is not the case; the word is used in each instance to indicate and specify what powers may legitimately be exercised by a legislature; an independent and sovereign department of the government, clothed with exclusive and plenary powers of legislation; and it is not easy to see why substantially the same signification, shall not attach to the word in both connections.

If it be doubtful what was really intended by this provision, then this doubt should be solved in favor of the public and against the company. That the R. R. Co. secured the benefit of the land by this act of the Legislature is not doubtful, and that the R. R. Co. in plain terms contracted to accept of the grant, upon the conditions specified

in the act, is conceded. This act then, and the written consent and acceptance of the company, together constituted a contract between the State and the company, and it has been frequently held that any ambiguity in the terms of a contract between the public and a corporation, must operate *against the corporation*, and *in favor of the public.*

Richmond R. R. Co. vs. Louisia R. R. Co., 13 How. 71, 81.

Rice vs. R. R. Co., 1 Black, 358, 380.

Com. vs. Erie & N. E. R. R. Co., 27 Penn. 339.

Dwarris Statutes, 749, 751, 688, 705.

Applying this rule to the construction of this statute, and it is submitted that the words, "rules and regulations," will be held to be broad enough to support the construction contended for by respondents.

Most certainly if this clause had been inserted, in the original charter, no one would have been found bold enough to undertake to maintain the position that the General Assembly would have no power to limit the charges of fares and tolls, since in such a case, there would be no room for the theory that it applied only to a general police regulation; for, there having been no grant of police power to the corporation, there could be no stipulation for the surrender of such power to the State. Without a shadow of doubt, such a reservation in the corporation act would have fully authorized the legislation in question, and must of necessity have excluded the idea that the provision was intended to have the narrow and limited significance which is now asked to be attributed to it.

It is however insisted that subsequent acts of the legislature, have construed this provision in the way now contended for by complainants, in that in other acts, the words "freight and passenger tariffs" have been used. These latter words have however been used in other acts passed in later years for the reason that the railway companies have contended ever since the question of the power of the legislature to control them in this respect has been raised, that the power did not exist, and that the words "rules and regulations," in the land grant act, were not broad enough to include a law regulating the freight and passenger tariffs. As soon as this position was assumed, and it became generally understood that the existence of the legislative power was denied by the companies, subsequent legislatures adopted the plan, and very wisely, too, of in-

serting in acts granting new powers, benefits and privileges, a provision in express terms, that companies accepting of such new powers, benefits and privileges, should be subject to legislative control in respect to freight and passenger tariffs. This was done out of abundant caution and in view of the construction which the companies contended should be put upon the land grant act.

It is too late now for the B. & M. R. R. Co., to insist that this condition should not have been inserted in the act. The company should be held estopped from denying the right of the State to impose that condition upon the grant, since it in express terms, in writing, assented thereto, for the purpose of inducing the State to select that company as one of the beneficiaries of the grant. Had this assent not been given, some other company would have been the beneficiary, and the B. & M. R. R. Co. would have been compelled to build its road as best it could; or rather it would certainly have failed to build any part of the road, and the undertaking would have proved a complete failure. Having availed itself of the benefit, derived by reason of its contract with the State, it would be an act of injustice, and at variance with the plainest principles of equity, to permit the company to retain all the benefits, and repudiate all the burdens of the contract.

The grant of lands, was to the State, and not to the railroad company. There was no provision in the grant that the State should ever convey it to any company. The expressed object of the general government, was "to aid in the construction of a railroad from Burlington to some point on the Missouri River;" not, however, to aid a particular company, or any company, to construct a road. The State could have directly entered upon the construction of the road, and retained the land; and in such an event, it would scarcely be contended that the General Assembly, would not have had entire power, by the enactment of rules and regulations, to control and direct the management and operation of the road. And if it could have done this, there can certainly be no good reason, why it could not, when selecting the grant or beneficiary to do the work, and receive the benefits of the grant, properly and legally stipulate to reserve to itself the same right and power of control, that it would have had if it had directly constructed the road, without the intervention of any agent or beneficiary.

It is a mistake, and a radical one, to suppose that the State was under any obligations to provide for the construc-

tion of this road through the instrumentality of any company. The Bur. & Mis. R. R. Co. had no rights whatever to this land grant, until after the legislative grant in July, 1856. Up to that time it was simply a supplicant asking for favors. It had no rights, legal nor equitable; and was entirely willing that the State should reserve the right and power of general control; and was willing that such reservation should be stated in the broadest and most comprehensive terms imaginable, viz: "that the company shall at all times be subject to such rules and regulations as the General Assembly may enact." Mark the language, "shall *at all times* be subject," etc. The present is at least *one time* when the company most vigorously rebels against such subjection; and entirely repudiates the idea that it ever seriously contemplated abiding by the terms of its agreement.

The suggestion that the condition subjecting the company to legislative control, is inconsistent with the terms of the grant to the State by Congress, has no foundation in fact or law.

The only conditions named in the grant to the State are these, viz:

1. The land to be disposed of by the legislature for the purpose of aiding in the construction of the road. This has been done.

2. The railroad so constructed to be and remain a public highway for the use of the government of the United States, free from toll or charge for transportation of property or troops of the United States.

3. That the United States mail be transported over the road at such prices as Congress should by law direct.

The most critical examination of the legislative grant to the company, fails to discover any violation of these conditions.

The United States has the right of free transportation of property and troops over the road, and the right to have the mail transported at such prices as congress may direct.

But even though it were true, that the condition of the legislative grant was inconsistent with the grant of congress, the railroad company acceded to such condition, received the land, and is therefore now estopped to say that the state had no right to insist upon the condition. And more than this, no one but the general government can take advantage of the breach of the condition in the grant by the government to the State.

In Schulenberg *vs.* Harrison, 21 Wall., 44, 63, it is said

by Field, J.: "It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. * * * *And the same doctrine obtains when the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.*"

If the government of the United States is satisfied with the conditions stated in the legislative grant to the company, it is entirely unnecessary for the complainants in this case to manifest such intense solicitude for the rights of the government. For all that yet appears in this case the government, even conceding that the grant to the company contains conditions at variance with the grant to the State, may waive, or has waived, the conditions in that grant; in such a case it is clear that complainants ought not and would not be heard to complain at any alleged breach of such conditions. But if no one but the grantor, (the government in this case). can take advantage of the fact that the grantee has failed to perform the conditions annexed, and if the grantor has asserted no such right, then it is difficult to clearly see why the complainants have any more grounds for complaiut on account of the breach of such conditions, than they would have in case of an actual waiver of such condition. In neither event are the complainants injured; since they obtained and retain all that they bargained for; when it is likely that the company will suffer damage, it will then be in abundant time to make complaints.

VI.

The Constitution of the State, adopted in A. D. 1857, gives the General Assembly the power to amend or repeal all laws for the organization or creation of corporations; and under this power it was competent for the legislature to enact the law under consideration.

The constitution of A. D. 1857 provides that, "the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly."

A general reservation of a power to amend or repeal

laws for the creation of corporations, has the same force and effect as a special provision contained in the charter, authorizing an amendment or repeal thereof. It was so expressly held in the case of Oliver Lee's Bank, 21 N. Y., 9, 15, where it is said: "The question before us, therefore, is narrowed to a consideration of the effect of the provision in the general banking law by which the right is in terms reserved to the legislature to alter or repeal it at any time. This, according to one view, is the reservation of a right only to change or repeal it, prospectively, from the passage of the modifying or repealing law, so that the associations which had been organized in the meantime would remain unaffected by such modification or repeal. On the other hand it is insisted that it *enabled the legislature to deal with the associations as though they were directly established by a statute containing in itself the usual reservation. I am of opinion that the latter is the correct view.*"

The same principle was recognized in Holyoke Co. *vs.* Lyman, 15 Wall., 500, where it is said by the court that: "The charter, in view of the fact that it contains no exemption, *is subject to the power reserved to the legislature by the general law, in operation when the charters were granted*, that all acts of incorporation shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the legislature. * * * It follows that the corporations are not exempt from that burden, and that the legislature, under the reserved power to amend, alter or repeal the charter, may pass laws to enforce that duty, as such a law does not impair any contract created by the charter, or infringe any right vested in the corporation. Charters subsequently granted must be understood as standing just as they would *if that reservation of the power to amend, alter or repeal the same had been incorporated into each charter.*"

This precise question was involved in Griffin *vs.* Kentucky Ins. Co., 3 Bush., 592, and the court say: "Then, was this general reservation of power, like a special reservation in the charter itself, a part of the contract; or, was the contract made subject to it, and the obligation defined or modified by it? We think so." To the same effect are Suydam *vs.* Moore, 8 Barb. 358; Miller *vs.* State, 15 Wall., 578; Comrs. *vs.* Holyoke Co., 104 Mass., 446; Story *vs.* Plank Road Co., 16 N. J., Eq, 13; Tomlinson *vs.* Branch, 15 Wall., 460; Penna. College Cases, 13 Wall., 190; Sherman *vs.* Smith, 1 Black., 587.

1. The charter of the B. & M. R. R. Co. has been amen-

ded in several important particulars, since the adoption of the constitution of 1857, as follows, viz.:

a. An increase of the capital stock from three to twelve millions of dollars was provided for in 1869. See page 18 of printed record.

b. Power was given to the company at the same time, to increase the liabilities from two to eight millions of dollars.

c. By amendment of same date, the company was authorized to build a road to more than one point on the Missouri river.

d. The General Assembly, by general law in March, A. D. 1864, authorized railway corporations to issue preferred stock; a power not possessed by such corporations prior to that time. Under this power the B. & M. R. R. Co. acted, and issued preferred stock. See page 17 of printed record, where it is shown that after the passage of this act, the directors amended the charter by inserting the following additional article, viz:

"Article 17. The company shall have the power to issue preferred stock under such restrictions and limitations as the board of directors may fix."

e. The charter was amended by the act of 1864, authorizing the company to lease its road.

Each of these amendmeuts was of an important character, and conferred upon the company new powers and privileges, not before possessed; each was also accepted and acted upon by the company. The capital stock of the company was largely increased, as is shown by the statement in complainants' bill, that the capital stock of the company, at the time of the lease and sale to complainants, was six and a half millions of dollars; whereas the amount originally authorized was only three million.

The bonded indebtedness of the company at the time of the consolidation with complainant, as stated in the bill, exceeded seven millions of dollars; the amount authorized by the charter was limited to three millions. Page 6 of printed record.

The adoption of the article to issue preferred stock was on the 28th of April, A. D. 1864. The act of the legislature authorizing this to be done was passed in March preceding. By reference to p. 18 of printed record, it will be seen that at a meeting of the stockholders, in June, A. D. 1869, more than two thousand and three hundred shares of preferred stock were represented and voted; from which it conclusively appears that the company availed itself of this

new power and privilege; that the privilege was a valuable one needs no argument to establish.

Under the amendment of June 23, A. D. 1869, authorizing the company to construct a road to more than one point on the Missouri river, a road was constructed from Red Oak to Hamburg, a distance of thirty miles; and this was done after the main line had been constructed from Burlington to Plattsmouth on the Missouri river; page 2 of printed record.

The statute of April, A. D. 1864, authorized railroad companies to make "contracts of lease or joint running arrangements with any connecting road, for the operation of such connection, upon such reasonable and just terms as may be agreed upon by the parties." The company has availed itself of this power by making a lease of its road, property and franchises, in perpetuity, to the complainants, and it is by virtue of such lease that complainants have a standing in court, and a position whereby they are enabled to contest in this action the validity of the railroad tariff act.

We insist that, no matter what may have been the nature or character of the original charter of the company, and no matter if, remaining unchanged, it would not have been competent for the legislature to have imposed new burdens, or additional restrictions upon the company, and no matter if it was entirely competent for the company to have preserved the sacred and inviolate character of the original charter by simply contenting ifself with its provisions, as it was prior to the adoption of the State constitution in A. D. 1857; still, since it did not so elect, but on the contrary, accepted and availed itself of a grant of new powers and privileges, it thereby voluntarily abandoned and surrendered the inviolability of the charter in its original form.

In the case of *Monong. Nav. Co. vs. Coon*, 6 Penn. St. 379, it appeared that a company was chartered under an act in 1835, and authorized to erect a lock navigation in a river, but to pay for all damages occasioned thereby. In 1839 a supplemental act was passed *in which new privileges were granted*, and reserving to the legislature "the right to alter, amend, or annul the charter," &c. In 1842 the company erected a dam on the river four miles below the mouth of a branch of the river. Parties owning mills and a dam on said branch six miles from its junction with the main stream, instituted suit to recover for injuries alleged to have resulted to them from the erection of the

dam in the main river by the navigation company. In that suit it was decided that the plaintiffs therein had no right of action. In 1844 it was enacted that the company should make amends for any damages done to the lands and property on the river "*or its branches or tributary streams;* thereby making the company liable for the very injuries and damages, which in the suit mentioned, it had been held they were not liable for. In a subsequent action to recover for such injuries, the court, per Gibson, C. J., said: "If the constitutionality of the declaratory act," the act of A. D. 1844, "depended upon the provisions of the original act of incorporation, we would be bound to pronounce against it. * * * * * * Now it has already been determined that the case before us was not provided for in the original act of incorporation; and had it continued to stand on that foot, the power of the State would have been incompetent to burden the company with charges not originally imposed on it. But in 1839 it accepted a grant of further powers and privileges, in consideration of an express reservation by the legislature of a power to alter, amend or annul the said charter of said company at any time thereafter; * * and, in execution of it, they declared, in 1844 that the company 'Shall make amends for any damage done, or that may be done' &c., to lands or property lying on the river or its branches or tributary streams, &c. *It is evident that by accepting additional privileges and powers on the terms prescribed in the grant of them, the company surrendered the inviolability of its contract to the discretion of the Legislature.*"

It being true that where the power to amend or repeal is contained in a general statute or provision, charters are, although containing no special reservation, to be interpreted and construed as though such reserved power had been actually and expressly incorporated into the charter, then most certainly amendments to charters granting new privileges and additional powers should also be construed and treated in the same manner. If an entire grant of the corporate powers must be considered as if the reserved power of control were connected with it, then a grant of only a part of such powers, should be likewise so considered. There can be no good reason, why there should be reserved to the legislature the power to supervise the actions of a corporation, where an entire charter be granted, but no power at all reserved, when only additional corporate powers are granted.

It often occurs that the additional grant conveys more valuable powers and privileges than did the original charter, and in such cases of course it is more important that the legislature should be able to control the exercise of such additional grant of powers and privileges than those originally granted.

A charter is but a grant of powers and privileges to a corporation; an amendment to a charter is but a grant of other powers and privileges; and if, the charter being granted while there is in force a general law by which the right is in terms reserved to the legislature to amend or repeal it, the legislature is thereby enabled to deal with the association as though it were established by a statute containing in itself the reservation of such right, it would seem that the necessary inference must be, that the amendment having been granted under similar circumstances and during the existence of a like general law, the same results must follow, and the legislature be held to have the same ample power to deal with the association as in the case of a grant of an original charter.

The corporation was under no obligations to accept of the amendment; was not impelled by law, or any irrestible force to use and exercise these additional functions and powers; it was entirely optional with the company to accept or reject them, but having elected to accept and enjoy the benefits, it ought certainly not to be permitted to escape the burdens imposed by the conditions annexed to the grant conferring such benefits. The grant and acceptance constituted a contract, obligatory in its character, and the corporation should be bound by it.

The constitution of Iowa, sect. 30, art. 3, provides that "the General Assembly shall not pass local or special laws, for the incorporation of cities and towns;" and it was held in Ex parte Pritz 9 Iowa 30, that this provision *prohibited the enactment of laws for the amendment of acts incorporating cities and towns;* and in Davis Bro. vs Woolnough 9 Id, 104, the same court held that, this provision rendered it incompetent for the legislature to *enact, amend or repeal* laws incorporating towns and cities.

In the former case it is said, "Suppose the legislature had passed an act amending the act incorporating the city, in which every section was changed except one, or suppose all but the first section had been stricken out, and an entire new law had been substituted,

would it be claimed that this would not be an infringement upon the prohibition contained in the section under consideration? And yet, if the power to amend is not withheld, we see no limit to the power to amend. If one section or one line may be amended then every section and every line may be." * * * * But again; to say that *the prohibition to pass laws for the incorporation of a city, does not include a prohibition to amend, we think, is narrowing the language used, to an unwarranted extent.*" In McGregor vs. Bayliss, 19 Iowa 43, a similar construction was applied to this provision.

Now, assuming that these cases were correctly determined, and we have it established that a clause prohibiting the enactment by the General Assembly, of a special law "for the incorporation of cities," also prohibits the enactment of a special law *amending* an act incorporating a city; and this being so, why does it not follow as a necessary inference, that when the constitution gives the General Assembly power to repeal or amend laws for the creation of corporations, it also by force of the same provision, gives the General Assembly power to repeal or amend laws that amend, as well as those that create corporations? Laws for the incorporation of cities, are laws *creating* such corporations; and if the clause which forbids the General Assembly to *create* these corporations by special laws, also prevents the General Assembly from amending by special laws, the acts of incorporation of cities; then there is no escape from the conclusion that a clause authorizing the General Assembly to repeal or amend a law *creating* a corporation, necessarily authorizes a law to repeal or amend a law which amends the incorporation law. And if this may be done, then assuredly it was competent for the legislature by the act in question, the tariff act, to amend the amended charter of the Burlington & Missouri River Railroad Company; and it is totally immaterial, whether it is considered an amendment to the original charter, or to the amendment thereto, or both, since after the charter had been changed by the amendments before referred to, and such amendments had been accepted by the Company, the whole constituted the amended charter.

If the Charter had been granted after the adoption of the constitution of A. D. 1857, it would, as the cases cited conclusively establish, have been construed as though there had been incorporated into

it, in terms, the provision that, "this charter shall be subject to amendment or repeal by the General Asrembly;" and in such a case it would have been competent for the legislature to have subjected the company to the law in question. We have endeavored to show that a law amendatory of the charter, and granting additional and valuable privileges and rights, and passed since the adoption of this constitution, should be construed in the same manner as an original charter granted at the same time, would be, viz.; as though there had been annexed to it, a provision that "this law shall be subject to amendment or repeal by the General Assembly;" and if this be true, if an amendment to a charter is to receive the same construction, and is to be governed by the same rules of interpretation as an original charter, then, complainants stand before the court, in just the same attitude, and clothed with just the same rights and immunities, and no others, as if the charter had been adopted at the time the amendments were.

If there had been incorporated into the land grant act, a provision or condition that the charter of the company should be subject to repeal or amendment by the General Assembly and the company had accepted the grant with such conditions annexed, it would scarcely be contended, that the company would not have been thereby placed in the same situation as would have been the case, had such condition been contained in the charter. But the various amendments to the charter, accepted by the company, after the adoption of the constitution of A. D. 1857, and by which very valuable and additional rights and privileges were obtained, having annexed to them by operation and construction of law, the condition that the charter should be subject to repeal or amendment, have the effect to place the company in the same situation as it would have been had the land grant act contained this condition.

Finally, upon this branch of the case, we insist that every beneficial amendment to the charter, accepted by the company since the constitution of A. D. 1857, was adopted, had annexed to it by operation of law, the constitutional provision subjecting the charter to repeal or amendment by the legislature; and that as a consequence thereof, the charter lost whatever of inviolable character it before then possessed.

"I was well, I wanted to be better; I took physic and here I am;"

was the terse but comprehensive epitaph written upon the tomb-stone of one not content to let "well enough" alone. If the company had been content with its original charter, which was well enough, and not been desirous of securing something better, the complainants would have escaped some, at least, of the embarrassments and difficulties now attending the case.

2. In regard to the branch roads, which were constructed by corporations chartered for that purpose after the adoption of the constitution of A. D. 1857, there can be no doubt whatever. They are certainly subject to be dealt with by the General Assemby, in the same manner as though each charter contained an express provision reserving the right of amendment and repeal; the authorities heretofore cited, establish that proposition beyond question.

It is urged however, that if this be so, yet there is a limit to this power of amendment or repeal, and that under it, the legislature cannot deprive a corporation of its property, or the right to fix its own compensation for services rendered, which counsel insists, is the same in principle and effect, as taking the property. Without entering into any discussion of the proper limitation of this power of the legislature, if indeed it have any limit, we do not hesitate to affirm that the limitation of the amount of fares to be charged is within the proper exercise of this reserved power.

In Zabriskie vs. Railroad Company, 3 C. E. Green, 180, it was said that "this power authorizes the legislature to require the company to build a double track, or widen the draw in a bridge, *or exact more or less toll;* these would be within the contract, or annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration."

It was held in Parker vs. R. R. C., 109 Mass., 506, that a statute limiting the rates of toll to be charged by ferry companies for passengers transported on the cars of Street Railway Companies, was constitutional and binding upon a ferry company incorporated before its passage, but whose charter was liable to amendment or repeal under the power reserved in a general statute. The act thus construed provided that "no ferry corporation or commissioners of a toll bridge, shall exact of a railway company whose cars cross a ferry or toll bridge less than one mile in length, any other toll than one cent on each passenger carried across in its cars." The court

said: "It is strictly an alteration or amendment of such provisions, and it is designed to promote the chief object of the grant."

Dixon, C. J., in Whiting vs. S. & F. R. R. Co., 25 Wis., 167, 198, speaking of the provision of the constitution of Wisconsin, reserving to the legislature the power to alter or repeal all charters, said: "The legislature, if it has not done so, may limit the tolls and fares to be received by the railroad company to a reasonable sum, beyond which the company shall not go."

And in reference to this same provision in the Wisconsin State constitution, this court in Olcott vs. Supervisors, 16 Wall. 678, 694, per Strong, J., said: "That the legislature of Wisconsin may alter or repeal the charter granted to the railroad company, is certain. This is a power reserved by the constitution. The railroad can therefore be controlled by the State. Its use can be defined; *its tolls and rates for transportation may be limited.*"

In the Railroad cases, 35 Wis. 423, 577, the validity of a statute expressly prescribing and limiting tolls and rates being under consideration, the court say: "But it is unnecessary to pursue this topic further, as there can be no doubt that here is as unquestionable an exercise of power to alter as can well be. The charters of the defendants gave them an unlimited right of toll. The alteration limited the right. This is a strict alteration, or there is no such thing as alteration."

In the case of P. W. & B. R. R. Co. vs. Bower, vol. 13 Am. Law Register 174, 180, a case much relied upon as establishing the principle that a legislature has no power in the absence of an express reservation, to limit or regulate the rates of charges of a railroad corporation, it was expressly held and conceded by the court that "it was undoubtedly competent for the legislature, by a provision in the charter, to reserve to itself the right to supervise and regulate this power of the company to charge for the transportation of passengers and freight."

It was held, in Griffin vs. Ken. Ins. Co., 3 Bush 593, competent for the legislature to absolutely repeal the charter of a corporation, under a power reserved in a general statute to amend or repeal all charters and grants of or to corporations. The court add: "We cannot resist the conclusion, that, just or unjust, reasonable or unreasonable, the repealing act did not impair the obligation of the contract of incorporation in this case."

For other instances showing the extent to which courts have gone in sustaining the exercise of such a reserved power see,

Oliver Lee's Bank, 21 N. Y. 9.
Sherman vs. Smith, 1 Black, 587.
Holyoke Comrs. vs. Lyman, 15 Wall, 500
Union Imp. C. vs. Com. 69 Penna. 140.
Com. vs. Fay. Co. R. R. Co. 55 Penna. 452.
State vs. Miller, 31 N. J. 521.
Fort Plain Bridge Co. vs. Smith, 30 N. Y. 44.
Com. vs. Eastern R. R. Co. 103 Mass. 254.
McLaren vs. Pennington, 1 Paige Ch. 102.
Miller vs. State, 15 Wall. 478.

But even if there were no cases to this effect, it would seem upon principle, that an act regulating and limiting the amount of fares and tolls to be charged, must certainly be within the limits of this reserved power, since such an act merely restricts the corporation in the use of the franchise; it in no manner changes the character of the franchise, or of any corporate right.

That the act under consideration is an amendment to the law creating corporations, within the true intent and meaning of the constitutional reservation is clearly shown by the cases cited, and by the cases of Bangor &c., R. R. Co., *vs.* Smith, 47, Maine 34, City of Roxbury *vs.* Providence R. R. Co-, 6, Cush. 431; in which it is said that "An act general in its terms, and applicable to all railroads in the commonwealth, and in its terms especially applicable to the case in question, is warranted, by the General act giving the legislature power to modify acts of incorporation, and that the legislature may thus modify or alter such charters."

VII.

The branch roads are subject to the operation of the law, because they accepted aid towards their construction, under a statute expressly providiug that roads accepting such aid, should be subject to legislative control in regard to their charges for transportation.

All of the branch roads, except the Red Oak branch, were constructed by the aid of taxes levied and collected in the various townships and cities through which they are severally located, and are

therefore of course subject to be controlled and regulated in their rates of charges by the General Assembly, since it was so provided in the law authorizing such taxes.

The section of the statute referred to, is as follows, viz :

"All railaoads constructed by or with the aid of any taxes levied and collected under this act, shall be subject to the control of the General Assemby in regard tc the management of the same, and the charges for the transporation of freight and passengers thereon." Chap. 102, Laws Thirteenth G. A.

That these branch roads were so constructed, is abundantly shown by the records, and we assume such fact will not be controverted. This fact having been established, there can be no qnestion about the validity of the tariff act, as to the branches, without utterly ignoring the above quoted provision of the act authorizing the taxes to be levied and collected.

It is, however, claimed that the Legislature had no power to annex such a condition to the law authorizing the taxation for the benefit of the roads.

We may be pardoned for saying that this objection has so little of substance, and so little foundation for its support, that it is difficult combat it. It must be conceded that in granting these charters originally, it would have been quite competent for the Legislature to have prescribed therein what rates the Companies should be permitted to charge- As was said by this Court in R. R. Co. *vs.* Maryland 21 Wall. 456; "This unlimited right of the State to charge, or to authorize others to charge toll, freight or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. It has a discretion as to the amount of that compensation. *That discretion is a legislative, a sovereign discretion, and in its very nature is unrestricted and uncontrolled.*" Here is an emphatic and explicit recognition of the principle that the authority to charge tolls and fares is derived from the Legislature, and that that body has the exclusive and sovereign discretion, to determine the amount of suchfares and tolls.

The legislature then, having the exclusive power originally, to authorize the corporation to charge tolls and fares for transportation,

and the sovereign discretion as to the amount thereof, it would seem that it must follow as a matter of course, that if it has transferred that power and discretion to a corporation, it may subsequently grant additional privileges and benefits to such corporation, upon condition that the latter shall surrender its exclusive right and franchise to fix the amount of tolls and fares to be charged for transportation.

The transaction by which the right was originally conferred upon the company was a contract, between the State and such company, and no valid reason is apparent why the legislature in a subsequent grant of new privileges may not stipulate for the surrender to the State of the right originally conferred. If one can be done by contract so can the other; and the cases cited under a previous head of this argument fully sustain this position.

A corporation, like an individual, should be estopped to repudiate its contracts deliberately made with the State; and if it voluntarily surrenders that which appears to be a minor advantage, in consideration for a greater one conferred by the sovereign power, it should be held to its agreement in such regard, and not be permitted to stand in court and claim both the new and the old. Having made a choice, let it be bound thereby.

But it is said that even if the legislature could properly attach to the law authorizing the levy of taxes, to aid in the construction of railroads, a condition that the roads so aided should be subject to legislative control in the matter of fares and tolls, yet this particular tariff act, is so unreasonable, that it is not obligatory upon the companies.

This, however, is mere assumption. There is nothing in the record to show the law to be unreasonable. The rates prescribed are compensatory, and abundantly liberal. It is true there is an allegation in the bill to the contrary, but complainants abandoned all effort to sustain the allegation by proof; it is therefore idle to insist that under the rates as fixed, the roads cannot be operated.

The truth is that nearly all the roads in the State are being operated under the terms and rates prescribed in this law; and during the first six months of such operation, with scarcely an exception, larger earnings were made, than during a corresponding six months of the previous year under terms and rates fixed by the companies them-

selves. And not only so, but in several instances, roads that in July, A. D. 1874, were classified in a lower class, were in July, A. D. 1875, owing to largely increased earnings during the year under the statutory rates, classified in a higher class.

It is urged that the law ought not to be enforced because the classification is not based upon correct principles. It is quite possible that the annual *gross earnings* of a road is not an accurate measure of what should be charged for transportation over such road; but this establishes nothing material to complainants' case; for while such earnings may not in all cases *accurately indicate* what is or is not compensatory, it is quite certain that they furnish *some data* upon which to base a conclusion. It is more than possible, that there are instances, where roads exhibiting a given sum of gross earning, cannot, owing to a variety of circumstances, afford to transport for rates as low as roads exhibiting a less amount of such earnings; but certain it is that ordinarily in Iown, the road exhibiting the largest earnings can afford to work at the cheapest rates. In fact however, it is, legally speaking, quite immaterial, so far as this branch of the case is concerned whether the rates fixed by the statute are compensatory or not; or whether the legislature did or did not adopt the best possible basis for the classification of the roads, since, if under the stipulation in the tax law, the legislature had the power to prescribe any rates at all, such power was plenary and was coupled with the sovereign discretion to establish such rates, as it chose to adopt.

"The legislature will not only choose its own modes of collecting information to guide its legislative discretion, but from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results."

Flint &c. Plank Road Company *vs.* Woodhull, 25 Mich., 99, 103.

VIII.

The law is uniform in its operation.

It is urged that the law is not uniform in its operation, and is therefore unconstitutional. The particular objection is, that the railroads of the State are divided into three classes, according to the gross earnings of the roads, and the rates established accordingly;

some roads being allowed to charge higher rates than others. It is objected that this classification and establisnment of rates renders the whole law unconstitutional, since by it all roads are not permitted to charge the same and equal rates.

It is however to be observed that all roads of each class, are permitted to charge the same and equal rates, and that the only distinction permitted is in the different classes. The law is uniform in its operation upon all roads in each class, and that is sufficient; that it is just and equitable that roads with a small amount of business, and whose gross earnings are scarcely sufficient to pay operating expenses, should be permitted to charge more than roads whose earnings are sufficient, after payment of all expenses, interest, taxes, etc., to enable the companies to pay reasonable dividends to stockholders, is too evident to admit of doubt; and since such is the case, the objection of want of uniformity should not be permitted to prevail, except in the absence of all doubt.

We have a statute dividing the cities of the State into two classes, and conferring upon the cities of one class powers and privileges entirely different from those of another.

The law relating to jurors, provides that in counties of less than fifteen thousand inhabitants, the panel shall consist of fifteen jurors, but in counties of greater population the number shall be twenty-four.

There is a statute authorizing the board of supervisors iu counties of more than twelve thousand inhabitants, to appropriate, without submitting the matter to a vote of the people, a sum not exceeding fifteen thousand dollars, to aid in the construction of a bridge; but in counties of a less population only five thousand dollars can be so appropriated, without first submitting the proposition therefor to the legal voters of the county.

Other instances illustrative of class-legislation can readily be given but those referred to are sufficient to call attention to the frequency, and it would seem absolute necessity of such legislation, and the great public detriment and inconvenience that would result if all such statutes were held unconstitutional. Statutes of this and similar character have been uniformly sustained.

Gebrick vs. State, 5 Iowa, 491.

Dalby vs. Wolfe, 14 Iowa 228.

McCormick vs. Rush, 15 Iowa 129.
McCormick vs. Bayliss, 19 Iowa 43.
McAunich vs. B. & M. R. R. Co., 20 Iowa 338.
Jones vs. Galena, 16 Iowa 6.
Clinton vs. C. R. & M. R. R. Co., 24 Iowa 455.
The City of Lafayette vs. Jenners, 10 Ind. 70.
Welker vs. Potter, 18 Ohio, St. 85.
Smith vs. Judge, 17 Cal. 547.
Durach's Appeal, 62 Pa., St. 491.
Cooley on Const., Lim. 390.

IX.

The alleged repugnancy to the clause of the federal constitution giving Congress power to regulate commerce among the States.

It is unnecessary to enter upon any discussion of the question, whether the law is or is not a regulation of commerce within the meaning of the federal constitution, since there is an express denial and disavowal on the part of the defendants, of any attempt to apply the provisions of the act to inter-state transportation.

That an act may be in part constitutional and in part not, has been so frequently determined that no reference to cases is necessary. In fact this is conceded, but it is contended for complainants, that the principle is inapplicable in this case, for the reason that the constitutional and valid portions of the law cannot be separated and distinguished from the unconstitutional and invalid portions, that each and every provision so inseparably relates to State and inter-state commerce, that it cannot be applied to one without, in a material manner, affecting the other.

This does not appear to us, however, to be true.

The same provision of the law, of course, relates alike to all passengers and freight to be transported, whether from one point to another within the State, or from a point within to a point without the State; but this in no manner or degree creates any difficulty in the practical application of the law. Each contract for transportation, whether of passengers or freight, is distinct from, and independent of every other contract, and in each contract the amount of compensation must be computed and agreed upon.

A person desiring to ship articles of freight, to several points at the same time, must make a separate and distinct contract for the shipment to each point; and the fact that some of the places are located without, and some within the State, in no possible degree either lessens or increases the difficulty that would have existed under similar circumstances, if the act had in terms been limited to transportation from point to point within the State. In either event in arriving at the amount of fares or compensation to be paid, the rates fixed by statute must govern where both termini are situated within the State; and when only one is within the State, then the rates fixed by the company govern. Under no circumstances are two different rates applied to the same article of freight; nor in any case, does it become necessary to resort to more than one rate, in arriving at the amount to be paid by the shipper or passenger. In no case does it or can it become a question of doubt, what rule to apply, unless indeed the agent of the company be ignorant of the State in which the place of consignment is situated; and such ignorance would be equally embarrassing, even if the statute in express terms limited the application of the law to the internal commerce of the State. Had there been incorporated into the law a provision, that the rates therein fixed should only apply to the transportation of freight and passengers from point to point within the State, it is very clear that the difficulties attending its application and enforcement would have been the same precisely, that they now are, and such being the case it is not easy to perceive that the objection here urged against its validity has any weight.

In Cooley's Const. Lim. 178, it is said: "If when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. *If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other.*"

In Com. vs. Kimball, 24 Pick 359, 361, there was involved the validity of a statute prohibiting the sale of intoxicating liquors in a less quantity than twenty-eight gallons, without a license, &c.

Shaw, C. J., said: "But it is argued for the defendant that the prohibition to sell is general, and makes no distinction between the cases of a sale by the importer of imported spirits, in the original packages * * and the sale of spirits not imported. Be it so; what is the consequence? Supposing the law could be construed to be repugnant to the constitution of the United States, in so far as it prohibited the sale of imported spirits by the importer in the original package, *it would be void thus far and no further, and in all other respects conforming to the acknowledged powers of the State government, it would be in force.*"

In Bronson vs. Kinzie, 1 How. 411, it was held that a State law, in terms applicable to all mortgages, that gave the mortgagor twelve months after a sale under a decree of foreclosure, in which to redeem; and which prevented any sale for less than two-thirds the appraised value of the property, was unconstitutional as to mortgages executed prior to the taking effect of the law, for the reason that it impaired the obligation of contracts. But it was said by Taney, Ch. J., in delivering the opinion of the court: "*Mortgages made since the passage of these laws must undoubtedly be governed by them;* for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction." The principle here stated is precisely like the one involved in the case at bar, since the statute, in terms, purported to affect all mortgages, but it was only held invalid as to pre-existing mortgages.

The Supreme Court of Iowa in Rosier vs. Hale, 10 Iowa, 470, and Landis vs. Abrams, 11 Id., 284, held that an act providing that no property should be sold under execution for less than two-thirds of its appraised value, could not constitutionally apply to contracts made prior to the passage of that act. But in Maple vs. Nelson, 31 Iowa, 322, it was held that as to contracts executed since the act took effect, sales of property under execution, without appraisement, or for less than two-thirds of the appraised value, were void. The effect of these decisions is to hold that the law, applicable in terms to all contracts, is invalid as to pre-existing contracts but valid as to those executed subsequent to the date that the law took effect. And such we believe will be found to have been the uniform doctrine

recognized by all courts that have had occasion to construe similar statutes.

We confess ourselves unable to see any distinction between the principle involved in those cases and that now under immediate consideration.

If the same article of freight could combine in itself the characteristics of both inter-state and internal commerce *at the same time*, there might be much plausibility in the argument urged for complainants; but since each shipment of freight, and each article of each shipment must necessarily be either one thing or the other, and cannot by any possibility be both at once, it is not easy to see why the statute may not be perfectly valid as to internal commerce, even though it should be held to be invalid as to commerce among the States.

X.

The Complainants are a foreign corporation, and it was therefore competent for the legislature to prescribe the terms upon which they should be permitted to transact business in Iowa.

It is entirely competent for a State to prescribe the terms and conditions upon which foreign corporations may lawfully transact business within the territorial limits of the State; and the complainants, being a foreign corporation, organized and chartered under the laws of the State of Illinois can do business in Iowa only in accordance with the laws of Iowa.

That the State law discriminates in favor of corporations organized under the laws of the State, and against foreign corporations, does not make against its validity, since there is nothing in the federal or State constitution, which forbids such discrimination.

Paul vs. Virginia, 8 Wall. 168.
Ducat vs. Chicago, 10 Id., 410.
Augusta, vs. Earle, 13 Peters, 516.
Ins. Co., vs. Com., 5 Bush, 68.

In these cases it was contended that corporations organized under the laws of one State, could not be prevented from doing business in another State upon the same terms and conditions as corporations organized under the laws of such other State. But the courts held otherwise. And in Paul vs. Virginia, it was said by the court:

"Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. *The whole matter rests in their discretion.*"

It was further insisted that foreign and domestic corporations were placed upon the same footing, and secured therein by the clause of the federal constitution, which provides that "the citizens of each State shall be entitled to the privileges and immunities of citizens in the several States." But this also was denied; and the courts held that corporations were not citizens within the meaning of that provision, and that therefore corporations seeking to do business in any State other than that wherein they were created, must submit to do it upon the terms imposed by such other State; not only so, but that this power of imposing restrictions and limitations, included the power to absolutely forbid foreign corporations from transacting business upon any terms within the State.

The principles established by these cases, lead to the conclusion, that it would have been competent for the legislature of Iowa, to have provided in express terms, that foreign corporations, including complainants, operating railways within the State, shall be restricted in their charges, to the rates of tolls and fares specified in this act, and that they should be absolutely prohibited from operating such railways, except upon and in accordance with the prescribed terms: and if this be so, these complainants have no just or legal grounds for complaint.

It is quite probable, however, that it will be urged for complainants, that having leased the road in question, with all the rights, franchises, priviliges, etc., in perpetuity which the Burlington & Missouri River R. R. Co., had and possessed, they are entitled to exercise and enjoy such right, franchises, and privileges in the same unrestricted manner, and to the same unlimited extent as would have been permitted and accorded to the lessors. This by no means follows.

Except by permission of the State, the B. & M. R. R. Co. could have had no power to make a lease of its franchises to any one; this

power was given by statute, not however, authorizing this particular lease to be made, nor yet to make any lease to the complainants in this case, but simply a power to lease generally. The statute conferred neither upon complainants nor upon any foreign corporation, any additional right or privilege not heretofore possessed; it only gave an additional power a new privilege to the domestic corporation; but any foreign corporation entering into a contract permitted and authorized by the State to the domestic corporation, must continue to labor under the same inconvenience and same liability to restriction limitation or prohibition, as though no such right had been given or power conferred.

If a private person, owning and operating a railroad in the State, shonld lease his road in perpetuity to a foreign corporation, he would in so doing, even in the absence of any enabling statute, only exercise a perfectly legal right; but it would in such a case hardly be contended, that, because the owner had a right to sell or lease, therefore the foreign corporation had a right to purchase and lease of him, and to operate the road, entirely independent of legislative restrictions and conditions. The right of the citizen or domestic corporation, to sell or lease property, is entirely separate and distinct from the right of persons or corporation to purchase, lease and use the property. A State may absolutely prohibit foreigners and foreign corporations from owning or using property within the State, and yet, such power in no way interferes with the right of the citizens or domestic corporation to sell or lease their property. The fact that some persons are by law disabled from acquiring or using property, has never been considered as an illegal or unwarranted interference by the legislature, with the right of other persons to sell, dispose of and transfer their property. A general right to sell is of course only a right to sell to those who may legally purchase or acquire, and if the purchaser has only a limited or qualified right to the use of property, that limitation attaches to the use and enjoyment of the property, from whomsoever acquired.

The limitation upon the use of the property, is because of the character and condition of the owner, and in no manner or degree arises from the property itself; and if the owner can only be freed from such personal disability or incapacity, then the use and enjoy-

ment of the property becomes as unlimited and unrestricted as though owned by others.

If this be not so, then there is but little practical force in the principles recognized in the cases cited; since if the right of the owners of property to the free and unrestricted use and enjoyment thereof, follows and attaches to the property itself, then foreign corporations by acquiring and purchasing property from those having an absolute title coupled with the right to such free and unrestricted use and enjoyment, can entirely free themselves from the disability and inconvenience under which they labor, and can thus evade the law, and force themselves upon the territory of a sovereign State against the will of such sovereignty. And if this may be done by one corporation, it may be done by many, and if legitimate in one instance, then legitimate in many instances; and thus the transaction or process be repeated indefinitely until a very large portion of the important business of the State would pass into the hands and under the control of foreign corporations.

This, however, is precisely what the courts hold cannot be done. As said by the court in Bank of Augusta vs. Earle, a foreign corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty;" and in Paul vs. Virginia, "The recognition of its existence even, by other States, and the enforcement of its contracts made therein, *depend purely upon the comity of those States*, a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests or repugnant to their policy;" and in Ducat vs. Chicago, "The power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, is clearly established."

The fact that the statute is general in its terms, and comprises all railway corporations, whether organized within or without the State, can make no difference, or rather cannot aid complainants, since it is competent to strike out the provision making it applicable to domestic corporations, and thereby leave the statute in full force as to foreign corporations.

The phrase used in the statute is, "all railroad corporations organized and doing business in this State, under the laws or authority thereof, shall be limited," &c, It is evident that this includes all

corporations, and if there are some corporations that it was not competent for the Legislature to include in the law, still such fact does not render the law invalid as to those who were properly included. If the statute used the terms "all corporations organized under the laws of Iowa, or under the laws of any other State," &c., it would be very clearly manifest that it was intended to enact a law applicable to domestic and to foreign corporations; and if the court should deem the law unconstitutional as to domestic corporations, would it also hold it invalid as to foreign corporations also, and for no other reason than that the two kinds of corporations were included in the same act? Quite clearly not.

But the language supposed is not substantially unlike that used, viz: "all railroad companies organized or doing business in this State, under the laws or authority thereof."

It is submitted, therefore, that inasmuch as a foreign corporation has no right to transact business in Iowa, except upon such terms and conditions as may be prescribed and imposed by the laws of the State, and since the complainants are a foreign corporation, owning and operating a railway within the State, and transacting therein such business as pertains to the ownership, operation, and management of such property, it was entirely competent and constitutional for the General Assembly of the State, by the enactment of the statute under consideration, to prescribe the terms upon which it should be lawful for them to continue the management and transaction of such business, and therefore, as to them, the law is not invalid.

XI.

A few words in reply to some of the general comments and criticisms upon the law, will conclude our argument.

It is said that if the principle underlying this legislation is recognized to be correct, and if the law is sustained, all railroad property will become comparatively valueless, all efforts to obtain money with which to construct other roads, and for the prosecution of new railroad enterprises, will prove vain and useless, and that even the operation of those already constructed must necessarily be temporarily suspended, if not permanently abandoned.

These are, however, but sombre flights of the imagination of those

who, purposely shutting out from view actual facts, delight themselves by indulgence in gloomy forebodings.

There are in the State of Iowa over thirty-five hundred miles of completed railways, and more than one half of these have been constructed by corporations organized and created since the adoption of the State constitution in A. D. 1857, which reserved to the General Assembly the right of control and power of supervision over corporations; more than two-thirds of these railways have been constructed by corporations, in relation to whom there were laws providing in express words and terms, that the roads constructed by them should, in the matter of rates of fares and tolls, be under the control and supervision of the legislature; and not only thus, but money for the construction of such roads was furnished after the enactment of such laws, and after the statutes, authorizing such construction, explicitly proclaimed to those about to furnish the money, that the legislature had asserted, and would insist upon the right to exercise such control over said roads; and more than this, the money was so furnished and the roads constructed, after several well nigh successful attempts had been made to enact a law, applicable to all railroads, similar in terms and provisions to the one now in question. In addition to this, during the year past there has been constructed and put in operation in the State more than one hundred miles of railway, and what is very remarkable, thirty miles of this has been constructed at the instance and under the anspices, and by ths direct agency of complainants in this case, and is now being operated by them; and what is equally remarkable, this has been done since the rendition of the decree in the court below affirming the validity of this statute; and what is even more remarkable, not to say surprising, is that this thirty miles of road was constructed by the aid of local township and city taxation, and is therefore, by an express provision and stipulation to that effect in the law authorizing the taxation, subject to legislative supervision in the matter of fares and tolls.

These facts constitute a complete and overwhelming answer to the assertion, that, to sustain the validity of the law, is to necessarily and permanently paralyze all future enterprises having for their purpose and object the construction of additional railways.

When it is urged, as it is, that it is neither wise nor safe to place

the roads in subordination to the unrestrained and unrestricted power and discretion of the legislature, by reason of the great danger existing that, at times, such power and discretion may be abused to the injury and detriment of the railway owners; we answer, this is likely to be true. Power and discretion, in whomsoever vested, and by whomsoever exercised, are liable to abuse. Human wisdom is not perfect, nor is human judgment infallible, and we may occasionally look to see these infirmities manifested in legislative anactments. But while this is undoubtedly true of the legislature and its acts, it is quite possible to be true, that the managers of railway corporations are subject to similar infirmities, and that the perfection of wisdom and justice will not at all times be manifested by them, if they are entrusted with this unlimited power and discretion.

Nothing in the history of the management of railways by those owning and having them in charge, affords any well grounded assurance that such owners are at all less likely to abuse the power with which they are entrusted than are others.

Equal and exact justice to all has scarcely been so cardinal and universal a rule by which railway companies have measured and tested their own acts in matters affecting the material interests and important rights of others, as to entitle them with any great degree of reason or propriety to speak of the abuse of power and discretion by other parties, or to assume to question the justice and wisdom of legislative enactments.

M. E. CUTTS,
Attorney-General of Iowa.

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Judge Clifford

Supreme Court of the United States.

OCTOBER TERM, 1875.

No. 552.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT,

vs.

M. E. CUTTS, Attorney General of the State of Iowa, APPELLEE.

On the —— day of March, 1874, the Legislature of the State of Iowa passed a law fixing a tariff of rates for the transportation of persons and property upon the railroads of the State, and prescribing heavy penalties against railroad companies and their employees for charges in excess of the rates so fixed.

The appellant is the lessee of the road and franchises of the Burlington and Missouri River Railroad Company, in Iowa, and, at the passage of the law above referred to, was in possession of the road and all its appurtenances and franchises, and was then, and still is, using and operating the road.

The appellant, claiming that under the charter of the Burlington and Missouri River Railroad Company, of which appellant is the lessee, it had the right to fix its own rates for transportation, continued to operate the road under the

tariff of rates which had been previously adopted by it, which differed from the rates prescribed by the law, and for doing so, suits have been brought, and prosecutions instituted against appellant and its employees, whereby the company has been much embarrassed in operating the road.

Asserting the unconstitutionality of the law—to protect itself from a multiplicity of suits and prosecutions—the appellant filed a bill in the circuit court for the district of Iowa to enjoin its execution.

The court refused the injunction and dismissed the bill, from which decree this appeal is prosecuted.

The appellant now moves the Court that this case be advanced upon the docket, and assigned for argument at some time during the present term of the Court, for the following reasons:

1. This case involves the same general questions with the cases from Minnesota, and some of the same questions which are included in the cases from Wisconsin, and other important questions of constitutional law; and as the cases from Minnesota and Wisconsin are for argument at the present term, the appellant company, and those interested in it, are desirous that their counsel shall be heard before decisions are rendered in the cases above referred to, which cover the same questions presented in this.

2. Because appellant is now, and will continue to be, harassed with suits and prosecutions until this case shall be decided.

3. Until this case shall be heard and decided, the interests of the company and of the community will alike suffer by the controversy between the State and the company, the

uncertainty as to the lawful rates of compensation for transportation over the road, and the excitement which is necessarily incident to the continual discussion of the question.

The Attorney General of Iowa has consented that this case shall be advanced. His agreement to that effect is hereto attached.

O. H. BROWNING,
F. T. FRELINGHUYSEN,
For Appellant.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1875.

No. 552.

Appeal from the Circuit Court of the United States for the District of Iowa.

The Chicago, Burlington & Quincy Railroad Company,
APPELLANTS,

vs.

M. E. Cutts, Attorney General, and William Christy, Treasurer of the State of Iowa, and Daniel Campbell,
APPELLEES.

ARGUMENT FOR APPELLANTS.

O. H. BROWNING, for Appellants.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1875.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1875.

NO. 552.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD CO., APPELLANTS,

VS.

M. E. CUTTS, ATTORNEY GENERAL, AND WILLIAM CHRISTY,
TREASURER OF THE STATE OF IOWA, AND
DANIEL CAMPBELL, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IOWA.

Argument for Appellants.

O. H. BROWNING, FOR APPELLANTS.

CHICAGO:
BEACH, BARNARD & CO., PRINTERS, 98 RANDOLPH ST.
1875.

ARGUMENT.

The answer questions the right of the Burlington and Missouri River Railroad Company to lease its franchises to the appellant. The objection is not, I believe, insisted upon in argument; but, before proceeding to the discussion of the questions arising upon the record, it may be well to bring to the notice of the court the laws which confer the authority to make a lease of the franchises, as well as of the tangible property.

Sections 1,332, 1,333, and 1,334 of the Revision of 1860 of the Laws of Iowa, all authorize the making of running arrangements between companies whose roads meet or intersect. Section 1,334 is as follows:

"That any railroad company heretofore organized, or "which may hereafter be organized under the laws of this "State, and which may have constructed, or commenced "the construction of their road so as to meet and connect "with any other railroad in an adjoining State, at the "boundary line of this State, shall have the power to make "such contracts and agreements with any such roads, "constructed in an adjoining State, for the transportation

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" of freight and passengers, or for the use of its said road, " as to the board of directors may seem proper."

Chapter 86 of the Laws of 1864, page 96, is upon the same subject. The fourth section of that chapter is as follows :

" The board of directors of any railroad company shall " have power to authorize contracts of lease, or joint run- " ning arrangements with any connecting road, for the " operation of such connection, upon such reasonable and " just terms as may be agreed upon by the parties, and " the party thus leasing or operating the railroad of an- " other company, shall, in all respects, be liable to the " public for their acts or negligence, in the same manner " as though the road belonged to them."

Railroad companies are thus, in general terms, empowered to lease their roads to other companies, the contracts of lease to be such as the board of directors may authorize, and such as will enable the lessee company to take possession of, and operate the road, and make it responsible for the management thereof, in all respects, as if it were the owner of the road. This it could not do without the use of the franchises of the lessor; and the general terms in which the power to make contracts of lease is given, are clearly broad enough to include the franchises, as well as the tangible property. Nothing is specified. It is not an authority to lease the road and corporeal property alone; they are not mentioned; nor are the franchises.

The power conferred is to make such contracts of lease as will enable the lessee to take the road precisely as the lessor held it, with all the rights, privileges, faculties and capacities which pertained to the lessor, for its management, use and enjoyment.

The only franchise necessary to be considered in this

case is that of demanding and receiving compensation for transportation, and fixing the rates thereof. This is the only one in controversy here; and that this was transferred to the lessee of the road is made too clear for doubt, by reference to other laws of Iowa bearing upon the subject, in addition to the above.

An act entitled "An act in relation to the duties of rail-"road companies," was passed April 8th, 1862. (See Chap. 169, Session Acts 1862, p. 197.)

Among other things, this act provides that, "in the "month of September, annually, each railroad company "shall fix its rates of fare for passengers, and freights "for the transportation of timber, wood, coal, &c."

On the 8th of April, 1868, another act in relation to railroads was passed, the first section of which is as follows:

"That all the duties and liabilities imposed upon rail-"road companies, by Chapter 169 of the Laws of the "Ninth General Assembly, shall apply equally to all les-"sees of any railroad company operating the same within "this State, as fully as if such lessees were named there-"in."

This recognizes the franchise of fixing the rates of fare, as pertaining to the lessees, and requires them to exercise it.

Section 1,300 of the Iowa Code of 1873, p. 238, provides that any railroad corporation may sell or lease its railway, property and *franchises* to, or may make joint running arrangements with, any corporation owning or operating any connecting railway, &c.

In the margin of the Code this is referred to as Section 4, Chapter 86, of the Laws of the Tenth General Assembly, which is hereinbefore copied.

Section 1,300 of the Code is, then, a legislative construction of § 4, Chap. 86, of the Laws of the Tenth General Assembly, which clearly establishes the right of railroad corporations, under the general authority given by the last mentioned act, to make "contracts of lease," which shall give to the lessors the same rights to the franchises as to the tangible property.

When all this legislation is taken and considered together, it is made very clear that the Burlington and Missouri River Railroad Company had the same power to transfer its franchises by its contract of lease, that it had to transfer its corporeal possessions.

I now take up, in their order, the propositions stated in the brief.

I.

The charter of the company is a contract, under the protection of the Constitution of the United States, the obligation of which cannot be impaired by any act passed by the Iowa Legislature.

This proposition has been so often considered and decided, by this and other courts, as to forbid its further discussion.

The authorities in support of it are very numerous, but I will not trouble the court by reference to any except the recent cases of *Miller* v. *The State of New York*, 15 Wall., 478; *Pacific R. R. Co.* v. *Maguire*, 20 Wall., 42, and *Railroad Co.* v. *Maryland*, 21 Wall., 456.

An effort has been made to withdraw railroad charters from the application of the principles announced in the Dartmouth College case; but the decisions in the cases now referred to have settled, conclusively, that the charters of railroad companies, like the charters of other private corporations, are contracts protected by the constitution; and have closed discussion and controversy over this question.

The question here, then, is not whether there be a contract, but what the contract is.

When the court shall have settled upon the true construction of the contract, and have ascertained its terms and conditions, and the rights, powers and privileges of the parties under it, it will have no difficulty in protecting those rights from invasion and destruction by legislative power.

II.

It is contended by the appellant, that, under the charter, and the constitution and laws of Iowa, which existed at the time of the organization of the Burlington and Missouri River Railroad Company, that company had the

right to fix the rates of compensation for the transportation of persons and property over its road, and that this right was a material and valuable part of its contract with the State which the State could neither take away nor impair, without the consent of the company.

On the other hand, it is contended by the appellee that the entire subject of compensation, for services rendered by the company, is under the control of the General Assembly; and that the legislature may, in its discretion, prescribe any rates whatever, for the transportation of persons and property upon the road, and change and alter them at pleasure, and compel the company, by pains and penalties, to accept of, adopt and conform to such rates.

This is the whole controversy. To settle it, resort must be had to the contract between the State and the company.

If, under the charter, the company had the right to make its own contract for compensation for services rendered, then the legislature cannot take away that right, without the consent of the company, and any law which assumes to do so is a nullity.

If, on the other hand, by the terms of the charter, or by any pre-existing law, the right to fix the tariff of rates was reserved to the State, then the legislature may, at its pleasure, and in its discretion, prescribe the rates, and the company must abide by them, whether compensating or not, and although they may be inadequate to meet running expenses.

The attention of the court is, then, invited to a consideration of what the contract between the State and the company was, and is.

The Burlington and Missouri River Railroad Company was incorporated January 15th, 1852.

The constitution, adopted in 1846, was then the supreme law of Iowa, and the only provisions of that instrument,

which are supposed to have any bearing upon the case, are the following :

ART. I, § 1. " All men are, by nature, free and inde-
" pendent, and have certain inalienable rights, among
" which are those of enjoying and defending life and lib-
" erty; acquiring, possessing and protecting property, and
" pursuing and obtaining safety and happiness."

ART. I, § 6. " All laws of a general nature shall have
" a uniform operation."

ART. I, § 18. " Private property shall not be taken for
" public use without just compensation."

ART. III, § 1. " The powers of the government of Iowa
" shall be divided into three separate departments — the
" legislative, the executive and the judicial; and no person
" charged with the exercise of powers properly belong-
" ing to one of these departments, shall exercise any func-
" tion appertaining to either of the others, except in cases
" hereinafter expressly directed or permitted. The legis-
" lative authority of this State shall be vested in a senate
" and house of representatives, which shall be designated
" the General Assembly of the State of Iowa."

ART. VIII, § 2. " Corporations shall not be created in
" this State by special laws, except for political or muni-
" cipal purposes; but the General Assembly shall provide
" by general laws, for the organization of all other cor-
" porations, except corporations with banking privileges,
" the creation of which is prohibited."

This constitution will be found in the Revision of the laws of Iowa, 1860, p. 969.

The only provisions of the law of Iowa relating to corporations, under which the Burlington and Missouri River Railroad Company was organized, to which I deem it material to call the attention of the court, are the following, to be found in chapter 43 of the Iowa Code of 1851 :

§ 673. " Any number of persons may associate them-
" selves, and become incorporated for the transaction of

" any lawful business, including the establishment of fer-
" ries, the construction of canals, railways, bridges, or
" other works of internal improvement; but such incor-
" poration confers no power or privilege not possessed by
" natural persons, except as hereinafter provided."

§ 674. "Among the powers of such body corporate
" are the following : * * * *

" 6. To make contracts, acquire and transfer property,
" possessing the same powers in such respects as private
" individuals now enjoy.

" 7. To establish by-laws, and make all rules and reg-
" ulations deemed expedient for the management of their
" affairs, in accordance with law, and not incompatible
" with an honest purpose. "

§ 675. " Previous to commencing any business, ex-
" cept that of their own organization, they must adopt
" articles of incorporation, which must be recorded in the
" office of the recorder of deeds," &c.

§ 676. " Corporations for the construction of any work
" of internal improvement must, in addition, also file a
" copy of such articles in the office of the Secretary of
" State, and have the same recorded by him in a book
" kept for such purposes."

§ 677. " A notice must also be published for four
" weeks in succession, in some newspaper, as convenient
" as practicable to the principal place of business."

§ 678. " Such notice must contain :

" 1. The name of the corporation, and its principal
" place of transacting business.

" 2. The general nature of the business to be trans-
" acted.

" 3. The amount of capital and stock authorized, and
" the times and conditions on which it is to be paid in.

* * *

" 5. By what officers or persons the affairs of the com-

" pany are to be conducted, and the times at which they " will be elected.

" 6. The highest amount of indebtedness or liability to " which the corporation is, at any time, to subject itself."

§ 680. " No change in any of the above matters shall " be valid, unless recorded and published, as the original " articles are required to be."

The articles of incorporation declared the purpose to be " the construction of a railroad from Burlington to the " Missouri River."

In Art. 3 of the charter it is provided that " the cor- " poration may make contracts, acquire and transfer prop- " erty, establish by-laws, and make all rules and regula- " tions deemed expedient, in accordance with law, and " with these articles, *and in general, may do all acts which* " *are necessary and proper to carry into effect the object of* " *this incorporation.*"

ART. 10. " The object of this incorporation is to con- " struct and *use a railroad*, extending from Burlington to " the most eligible point on the Missouri River, and along " the most eligible routes."

ART. 16. " These articles of association may at any " time be changed by the unanimous consent of the whole " board of directors, or they may be changed by the vote " of the stockholders, at any general or special meeting, " provided that not less than four weeks' notice of such " change, specifying its exact character, be given im- " mediately prior to such meeting, in two newspapers " printed in Burlington, and in such other manner as the " directors may prescribe."

It is thus seen that the Burlington and Missouri River Railroad Company was chartered for the purpose of constructing and *using* a railroad from Burlington to the Missouri River, and endowed with all the powers and

faculties to enable it to accomplish the ends of its creation, including the right to make contracts, acquire and transfer property, possessing the same powers, in such respects, as private individuals; to establish by-laws, and make all rules and regulations deemed expedient, and in general, to do all acts which might be necessary and proper to carry into effect the object of the incorporation.

As the object of the incorporation, declared both in the law and the articles of association, was to become a common carrier, both of persons and property, and as that object could not be effectuated without the right to demand and receive compensation for services rendered, the power to do so is necessarily included in the grant of authority to make contracts, and *to do all acts which are necessary and proper to carry into effect the object of the incorporation.*

Without tnis right, the company could not perform its duties at all, for it would be without the means of keeping the road in repair and operation, and supplied with rolling-stock and motive power; and the whole, sole and entire object of the organization, without the right to demand and receive compensation, would be defeated.

And, as in the constitution and laws of Iowa, there is no reservation of control over the charter of the company, either to repeal, alter or amend it, or in any manner, or to any extent, to interfere with the rates of compensation, the right to fix such rates is included in the express grant to the company, above referred to, to make contracts, and to do all acts necessary and proper to carry into effect the object of the incorporation.

And being a right conceded to the company by the charter contract, the legislature cannot interfere with or impair it, unless the power to do so is reserved; and then it does so by virtue of the reservation, by virtue of its agreement or contract with the company that it may do so, and not in consequence of any inherent power which,

as a legislative body, it possesses over the subject; for to prescribe the prices of services and commodities is, in no sense, a legislative faculty or function, and cannot be exercised as such, but only as a conventional right, with the assent of those for whom prescribed.

"Charters of private corporations are regarded as executed contracts between the State and the corporators, "and the rule is well settled, that the legislature, if the "charter does not contain any reservation, or other provision, modifying or limiting the nature of the contract, "cannot repeal, impair or alter such a charter, against the "consent or without the default of the corporation, "judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, where there "is no such reservation, is plainly unauthorized, if it is "prejudicial to the rights of the corporators, and was "passed without their assent."

Miller v. *The State*, 15 Wall., 488.

Long prior to this, in the Dartmouth College case, 4 Wheat., 518, the same doctrine was clearly and distinctly announced by Judge STORY. He said:

"In my judgment, it is perfectly clear that any act of a "legislature, which takes away any powers or franchises "vested by its charter, in a private corporation, or in its "corporate officers, or which restrains or controls the "legitimate exercise of them, or transfers them to other "persons, without its assent, is a violation of the obligations of that charter. If the legislature mean to claim "such an authority, it must be reserved in the grant."

And, in a very recent case in this court, *Baltimore & Ohio R. R. Co.* v. *The State of Maryland*, 21 Wall., 456, it was reiterated, in explicit terms, that the rate or amount of fare, and freight on a railroad, is entirely in the discretion of the company, if not limited by the grant.

In support of the same proposition, the court is referred to

Boyle v. *Philadelphia and Reading R. R. Co.*, 54 Penn., 312.
Penn'a R. R. Co. v. *Sly*, 65 Penn., 207.
Cooley's Const. Lim., 279, and cases there referred to.
Pierce on Am. R. R. Law, 461.

Thus far, my contention has been that the authority conferred upon the company by the charter, to construct and use a railroad, and in doing so, and in connection therewith, to make contracts, acquire and transfer property, establish by-laws, and make all rules and regulations deemed expedient in accordance with law, and with the articles of association, and in general, to do all acts which might be necessary and proper to carry into effect the object of the incorporation, was as complete a grant of the right and power to charge and receive compensation, and to contract for that compensation, free from legislative control or interference, as if it had been made in those very words. Clearly, every right and power which it was necessary and proper for the company to have ,to enable it to carry into effect the objects of the incorporation, is expressly granted ; and it is equally clear that the right to contract for, and receive compensation for services rendered, is not only necessary and proper, but indispensable alike to effectuating the object of the incorporation, and to its very existence.

But it is quite immaterial whether the power is expressly conferred or not.

There can be no doubt that it is necessarily implied from the grants which are made, and the nature of the business for which the company was created; and an implied power, right or condition in a contract, is as much a

part of the contract, and as inviolable, as an express one. And every power, without the possession of which a corporation cannot perform its duties, or fulfill the purposes of its creation, is implied in the grant, though not expressly given.

The People v. *Marshall*, 1 Gilm., 684.

When a charter of this description is granted, the corporation take, as an incident, the right to employ all reasonable, necessary, and proper means for the accomplishment of the end of their organization, unless limited by their charter; and in these, as well as in the express grants and exemptions, they acquire a vested right, subordinate only to the general welfare of society.

O. & M. R. R. Co. v. *McClelland*, 25 Ill., 141.

In *Boyle* v. *Philadelphia & Reading R. R. Co.*, 54 Penn., 316, the court, in speaking of the charter of the company says: "No provision was made respecting rates "and charges for their own service as carriers; but the "very purpose of their incorporation was that they might "carry. How can they carry without compensation?

"Authorized to engage in a business, it is necessarily "incident to their authority that they have the rights "which ordinarily belong to such a business. * * "* The right to charge is implied in the nature of "the business authorized, and I cannot conceive of con-"ducting the business of transportation without the impo-"sition of rates and charges."

The same thing is repeated in

Penn'a R. R. Co. v. *Sly*, 65 Penn., 211.

Now, the right to demand and receive compensation for the transportation of persons and property over its road, is vital to every railroad corporation; and when the charter is silent upon the subject, is necessarily implied in the grant of power to construct, maintain and operate a railroad; for without the possession and exercise of such power, the corporation cannot perform its duties, accom-

plish the purposes of its creation, or continue its existence. Without this, all its other powers are nugatory and useless.

It is this which vitalizes them all. And when the power to demand and receive compensation exists, either by express grant or by necessary implication, the right to prescribe the rate of such compensation is with the corporation, and is necessarily exclusive.

Here, the right is in the company, not only as an attribute of the ownership of the property used, (State freight tax, 15 Wall., 233), but also because necessarily incident to, and included in the legislative grant of power to do all acts which are necessary and proper to enable the company to effectuate the purposes of its creation.

Had the grant been in express terms, as in the Illinois charter of the complainant company, there could have been no question that it constituted a part of the contract between the company and the State; and that the right could not be taken away, or materially abridged without an infringement of the obligation of the contract. But an implied grant in a charter is as much a part of the contract as an express one; and, if in this case, the right to prescribe the rate of compensation existed in the company by implication, a law of the legislature which denied, or materially restricted that right, would be as much an impairment of the obligation of the contract, as if the charter had contained an express grant of the right.

Ang. & Am. on Corp., § 111.

The People v. *The Manhattan Co.*, 9 Wend., 393.

And if the right existed, it was exclusive. The power is a unit. It cannot be divided. Nor can it be held and exercised concurrently by two distinct bodies or agencies. Wherever it exists, it exists in its entirety; and to say that the company has the right to fix its rates, subject to the

power of the legislature to unfix them, is simply to deny its possession of the right at all.

Railroad companies are common carries, and being such, they have the right, which is characteristic of the class, to compensation for services.

Without that right, the attributes, duties and responsibilities of common carriers do not attach.

No person is a common carrier, in the sense of the law, who is not a carrier for hire; and it is the reward which renders him liable.

Angell on Carriers, § 124.

Judge STORY says: "I take it to be exceedingly clear, "that no person is a common carrier in the sense of the "law, who is not a carrier for hire; that is, who does not "receive, or is not entitled to receive, any compensation for "his services. The known definition of a common car- "rier, in all our books, fully establishes this result. If no "hire or recompense is payable, *ex debito justitia*, but some- "thing is bestowed as a mere gratuity, or voluntary gift, "then, although the party may transport either persons or "property, he is not, in the sense of the law, a common "carrier; but he is a mere mandatory, or gratuitous "bailee, and of course, his rights, duties and liabilities are "of a very different nature and character, from those of a "common carrier."

The Citizens' Bank v. *The Nantucket Steamboat Co.*, 2 Story, C. C. R., 35.

Now, as none are common corriers, except such as carry for hire and compensation, it follows that when the court decides that a railroad company is a common carrier, there is necessarily included the further decision that such company is entitled to charge and receive compensation for its services; and the decisions of all courts, where the principles of the common law obtain, are uniform, that railroad companies are common carriers. And it matters not that

the charters of the companies may be silent upon the question of compensation.

They are created to do the business of carriers; to be carriers of persons and property, and have no other vocation or employment.

If they have no authority to demand and receive compensation, they are not common carriers. If common carriers, they have that right by virtue of the charters which impress upon them that character and its attributes, as fully, and to the same extent, as if it were given in express terms. The right is given by the charter; exists by the charter; is part of the contract with the corporation; and, while the charter continues in force, cannot be taken away without impairing the obligation of the contract, whether the grant of the power be in express terms, or only by necessary implication.

In *Brown* v. *The State of Maryland*, 12 Wheat., 419, and the License cases, 5 How., 574, it was held by this court, that authority given to import necessarily carried with it the right to sell the imported article. So to , and for the same reason, the authority to construct and equip a railroad, and to transport persons and property thereon, necessarily carries with it the right to contract with passengers and freighters for compensation for the service, and to demand and receive such compensation; and the right, being conferred by the charter, cannot be withheld or materially restricted or impaired, without a violation of the contract between the company and the State.

In a very recent case in this court, *Miller* v. *The State of New York*, already referred to, and wh'ch involved the construction of a railroad charter, this has been very explicitly declared to be the law.

The contract between this company and the State of Iowa has received a legislative construction, in harmony with the foregoing rules, which ought to put at rest all

question as to the rights, powers and franchises to which the company is entitled by its charter.

From the organization of the company, till March, 1874, a period of more than twenty years, the uniform and unvarying construction, which was given to the charter by both contracting parties, the State and the company, was that it vested in the company the right and power to demand and receive compensation for the transportation of persons and property over its road, and to fix the rates of such compensation, by contracts with its patrons, without the interference. and free from the control of the legislature in that regard.

When the laws under which the company was incorporated, were enacted, it was not the intention of the legislature to retain control over the tariff of rates; nor did they ever claim that they had done so, or assert, or attempt the exercise of such control, until the passage of the act to establish reasonable maximum rates of charges, for the transportation of freights and passengers on the different railroads of the State, which was approved March 23, 1874.

This is shown by the uniform practice of the company, with the knowledge and acquiescence of all the departments of government in Iowa, from the time the first train was run over the road, continuously on, and by the uniform course of railroad legislation in Iowa for more than twenty years.

It has already been shown that the general incorporation law, under which the Burlington and Missouri River Railroad Company was organized, and the provisions of which entered into and became a part of the charter of the company, was silent in regard to rates of compensation. The subject was not mentioned, nor was there any reservation, whatever, of legislative control over the corporations to be organized under the law.

By the same legislature which passed this general law

authorizing the creation of corporations for the construction and use of railroads, provision was made for the construction of works of internal improvement by other agencies.

The county courts of the several counties were authorized to grant licenses for ferries, bridges, railroads, macadamized roads, plank roads, &c.

In regard to works of internal improvement, it is manifest, from an examination of the law, that it contemplated two different classes of persons or corporations for their construction, with different powers and capacities. The corporations which might file articles of association, and incorporate under the general law, were expected and intended to become common carriers on their own roads, with the privileges and responsibilities of that employment, including the right to contract for, demand and receive compensation for services rendered; whilst those who should build canals, roads, or bridges, under licenses from the courts, were not endowed with the faculties of common carriers. They were expected to furnish only the roadway to others, who should supply vehicles and motive power, and become common carriers over the roads.

The one would be entitled to compensation in the form of tolls for the use of the road; the other to compensation in the form of fares for services rendered.

The payment in the one case would be for the privilege of using the road; in the other, for the services rendered upon the road.

The legislature had the whole subject before them, and we must presume that they considered it in all its aspects and bearings.

Over tolls for use, they thought it expedient to retain control, and did so. Fares, for services in transportation, they wisely left to be regulated by the carriers, trusting to competition, to the laws of trade, and to the instincts of self-interest, to adjust them on a proper basis.

In respect to the rates of fare and freight to be paid to the carrier companies incorporated under the general law, and to the carriers who might use the roads built under licenses from the court, the statute is silent; whilst in respect to tolls for the use of the way, the statute has the following reservations:

"* * * the rate of toll will be under the control "of the county court." * * * (Code 1851, § 729.)

"* * * but the county court may, in its discretion, "in fixing the rates of toll, permit a greater amount to be "collected during certain hours of the night time." (§ 734.)

"The court, in its discretion, may, at the time of grant- "ing the license," (to build a rail, macadam or plank road), "fix the maximum rates of toll to be charged on "any such work, and may render the same unalterable "for a period not exceeding twenty years from the time "tolls are begun to be charged thereon, after the expira- "tion of which time the rate of tolls shall be under the di- "rection of the county court, in the same manner of those "of ferries and bridges." (§ 736.)

"The rates of toll established as above contemplated "must be conspicuously posted up at every gate or other "place where tolls are required to be paid, under the same "penalty as is hereinbefore fixed in the case of ferries." (§ 738.)

"Any person who refuses to pay the regular tolls es- "tablished and posted up in accordance with the provis- "ions of this chapter, or who shall run through, or pass "around their toll gates with the view of avoiding the pay- "ment of just tolls or dues, forfeits the sum of five dollars "for every such offense," &c. (§ 750.)

Taking these provisions all together, it is very clear that they have no relation to the rates of fare to be paid to carriers for services, but only to the toll, as distinguished from fare, to be paid for the privilege of transit over a way of which another is the proprietor.

The tolls the legislature thought proper to make subject to regulation by the courts which granted licenses. The rate of fare they left under the control of the carriers.

This question is discussed, and the distinction between tolls and fare clearly pointed out, in

Boyle v. *Phil'a & Reading R. R. Co.*, 54 Penn., 310.

The Penn'a R. R. Co. v. *Sly*, 65 Penn., 205.

It must be, and is, admitted by the appellee, that the railroad company, as a common carrier, is entitled to compensation for services rendered. This being so, the right to fix the rate of compensation must exist somewhere. It must be either with the legislature or the company. Not being a legislative function, the General Assembly can claim and exercise it only by virtue of a reservation in its contract with the company. No such reservation was made—hence the right is not with the legislature, either as an inherent legislative power, or as a power reserved in the charter to be exercised under the contract with the company.

The company, then, as a common carrier, being entitled to compensation, and no control over the rates of such compensation having been reserved by the legislature, the right to fix the rates by making its own contracts therefor, must be with the company.

III.

The right which the company had under its charter, and the laws which existed when it was organized, to receive compensation for services, and to fix the rates of such compensation, by making its own contracts therefor, has never been forfeited or surrendered,' but is still an existing right.

It is insisted by the appellee that, although the right of making its contracts for fares may, under the charter, originally have been with the company, yet that the company has since surrendered it to the State, and that the State may now exercise it against the will, and to the exclusion of the company.

This claim of surrender rests upon two grounds.

First. That by an act of the legislature of Iowa, passed July 14, 1856, the lands which had been granted by Congress to aid in the construction of a railroad from Burlington to a point on the Missouri River, near the mouth of Platte River, were granted to the Burlington and Missouri River Railroad Company, and that by accepting the grant, it consented that the legislature might thereafter fix and regulate the rates of fare for transportation over the road.

Second. That since the organization of the company, a new constitution has been adopted in Iowa, which went into effect in 1857; that since that time, the company has made some amendments to its charter; and that, by so doing, has, in all things, subordinated itself to legislative control.

Of these in their order.

1. As to the effect of the acceptance of the land grant.

On the 15th day of May, 1856, Congress passed an act granting lands "to the State of Iowa, for the purpose of "aiding in the construction of railroads from Burlington, "on the Mississippi River, to a point on the Missouri "River near the mouth of Platte River," and other roads mentioned in the act.

The act contained a proviso that "the lands hereby "granted for and on account of said roads severally, shall "be exclusively applied in the construction of that road "for, and on account of which, such lands are hereby "granted, and shall be disposed of only as the work pro-

" gresses, and the same shall be applied to no other pur-
" pose whatsoever."

The third section of the act is as follows :

" That the said lands hereby granted to the said State
" shall be subject to the disposal of the legislature thereof
" for the purpose aforesaid, and no other, and the said
" railroads shall be and remain public highways for the
" use of the government of the United States, free from
" toll or other charge, upon the transportation of any prop-
" erty or troops of the United States."

The fourth section directs how the lands shall be disposed of as the roads progress; and adds: " If any of " said roads are not completed in ten years, no further " sale shall be made, and the lands unsold shall revert to " the United States."

The fifth and last section provides that the United States mails shall be transported over the roads, under the direction of the Post Office Department, &c.

11 Stat. at Large, 9.

It is thus seen that the State of Iowa had no beneficial interest whatever, not even a reversionary interest, in the lands, but that she held them as a naked trustee, to be disposed of in the manner and for the purposes directed by the act of Congress, and not otherwise. She was bound to devote the lands to the construction of the roads designated in the act of Congress, and could encumber their appropriation to such purpose with no conditions of her own. The dedication to the purposes of the roads was absolute and unconditional, only in so far as limitations were imposed by the act of Congress which made the grant; nor did the State, in making the grant to the Burlington and Missouri River Railroad Company, add any conditions, limitations, or restrictions, which limited or impaired any right or power which the company previously had in regard to the rates of transportation.

On the 14th day of July, 1856, the General Assembly of

the State of Iowa passed an act accepting the grant of lands made by the act of Congress, above cited, "upon "the terms, conditions and restrictions contained in said "act of Congress." (Revision of 1860, pp. 215, 216.)

The act then grants the lands along the line of the road, from Burlington to a point on the Missouri River, near the mouth of Platte River, to "the Burlington and Mis- "souri River Railroad Company, a body corporate, "created and existing under the laws of the State of "Iowa;" and the lands along the lines of the other roads specified in the act of Congress, to other companies.

The only other provision of this act to which it is necessary to call the attention of the court at present, is the 14th section, which is as follows: "Said railroad companies, "accepting the provisions of this act, shall, at all times, be "subject to such rules and regulations as may, from time "to time, be enacted and provided for by the General "Assembly of Iowa, not inconsistent with the provisions "of this act, and the act of Congress making the grant."

It is by virtue of this section that the appellee claims for the legislature of Iowa, the right to prescribe the rates at which appellant shall be required to transport passengers and property over its road. But the right reserved is, to make *rules and regulations*, not *contracts*; and it can, with no sort of propriety, be said that when the company conceded the right to make rules and regulations, it consented that the legislature should make its contracts for it. The fixing the rates of fare is but making a contract. It requires the assent and concurrence of two minds. The company announces the terms upon which it will transport. The passenger or shipper accepts them. The contract is made, and the transportation takes place. It is made in the same way, is subject to the same laws, and to be enforced by the same remedies, as other contracts between other persons. The merchant announces the terms upon which he will sell his goods; the farmer,

the terms upon which he will sell his wheat; the master of the steamer, the terms upon which he will carry freight or passengers—the terms are accepted, and the contracts are made; just as in the case of the railroad company, and the passenger or freighter. There is no legal distinction between the one contract and the other. It is not denied that the legislature might lawfully fix the rate of fares, if the right to do so had been reserved in the charter, or by general law existing when the charter was granted; but it is denied that the right may be claimed and exercised under the reservation of power in the land-grant act to make rules and regulations.

If this reservation includes the right to dictate the terms of one contract, it equally includes the right to dictate the terms of all; and the legislature may take the control of all contracts which it may be necessary for the company to make.

If the reserved right to make rules and regulations confers authority to fix the rate of fares, it gives equal power to prescribe the price per ton of iron; the price of ties, engines, cars and rolling stock of every kind; the salaries of officers; the wages of employees, &c.; for these are all contracts, in the same category with contracts for transportation; and a general authority under which the one may be made gives equal warrant for all the others. If the legislature has the right which is claimed for it at all, it is by virtue of the contract between the State and the company; for it is not a legislative power. It is contended by the appellee that the words "shall be subject to such "rules and regulations as may, from time to time, be en- "acted and provided for by the General Assembly," confer the authority. If so, it is only by forced construction. They do not, in their natural signification, import it. The rule is, that the court shall give to the contract the construction which will bring it as near to the actual meaning of the parties, as the words they saw fit to em-

ploy, when properly construed, and the rules of law will permit.

2 Pars. on Cont. 494.

In *Parkhurst* v. *Smith*, Willes, 332, it is said, the first thing the court should inquire into, is, what was the intention of the parties? "If the intent of the parties be plain "and clear, we ought, if possible, to put such a construc- "tion on the doubtful words * * * as will best "answer the intention of the parties, and reject that con- "struction which manifestly tends to overthrow and de- "stroy it."

It is admitted that this intention is to be sought for in the language which the parties have selected to express it; but, in exploring the language for that intention, the situation of the parties at the time, the property which is the subject matter of the contract, and the intention and purpose of the parties in making the contract, are to be fully considered.

2 Pars. on Cont., 499.

So, too, where the language is susceptible of more than one meaning, the practical construction which the parties themselves have given in the execution of the contract, is a valuable aid in determining the meaning of any particular provision.

The application of these rules to this case makes it clear to demonstration that it was never the intention of the State to reserve, nor of the company to concede, control over the rates of transportation.

The judge, before whom the case was heard below, while deducing the right of the General Assembly to prescribe the rates of fare from the reservation in the land-grant act, concedes that that reservation must be so interpreted as to effectuate the intention of the parties.

An extract from the opinion of the judge will enable the court more readily to comprehend the ground upon

which he explicitly places his decision, and the argument in reply to the position.

He says: "But if we should concede * * * that the company originally possessed chartered rights which the act of 1874 would violate, still it has surrendered any such right by its acceptance of the act of July 14, 1856. * * *"

The legislature accepted the trust by the act of July 14, 1856, and by that act gave the benefit of the grant to the Burlington Company, upon condition that it should assent to the provisions of that act, which it did. Among the provisions of the act thus assented to by the company, was the following: "That the company, accepting the "provisions of the act, shall, at *all times, be subject to such* "*rules and regulations* as may, from time to time, be "enacted and provided by the General Assembly of Iowa, "not inconsistent with the provisions of this act, and the "act of Congress making the grant. * * *" The company accepted the grant, and thereby agreed to be subject to this condition.

The only question then, is, as to the extent of the power recognized or given by the words "rules and regulations." * * * Doubts as to the extent of the power of the State over the corporation, under the then existing legislation, suggested the provision in question, and it was undoubtedly the design of the legislature to secure a substantial right to the State, or a recognition, by the company of such a right in the State. It is to be regretted that words were not used which would admit of no dispute, but as it is, we must interpret those employed, so as to effectuate the intention of the parties."

Thus far the opinion of the judge.

I agree with him fully, that the words, "rules and regu- "lations," must be so interpreted as to *effectuate the intention of the parties.* "Doubts," says the judge, "as to the

" extent of the power of the State over the corporation, " under the then existing legislation, suggested the pro- " vision."

What was the then existing state of legislation which gave rise to doubts; and what were those doubts which it was the wish of the parties to remove by the condition inserted in the land grant act ?

The solution of these questions will give most valuable aid, in determining what the intention of the parties in that regard was.

By the then existing legislation, the company had power to make contracts; to acquire and transfer property; to establish by-laws; and to make all " rules and regulations " deemed expedient for the management of its affairs. There cannot be a doubt that " rules and regulations," as here used, had reference to the police of the road, and to nothing else. All other powers which it was intended the company should have, had already been conferred.

It had been given the same dominion over its property, the same control of its use, and the same right to make contracts in respect to its use, that was possessed by natural persons.

All this having been done, the law and the charter then gave it further power to make all rules and regulations deemed expedient for the *management of its affairs.* That is, the power over the police of the road, in the prosecution of its business as a common carrier.

The right to regulate the police of the road having been thus conferred upon the company by the charter, and by the existing legislation of the State, and the company having exercised the power, doubts arose as to whether the State could longer exercise its police powers in respect to the same subject, and, if it did so, whether the police regulations of the company would, or not, be subordinate to such as the State might prescribe. To remove these doubts, the land grant act required the company to con-

sent to become subject to such "rules and regulations," as might, from time to time, be enacted and provided by the General Assembly of Iowa.

The company was not called upon to surrender any other right or privilege, but was left in the full possession of the right to acquire and transfer property, and to make contracts respecting the use of its property, and its services in connection therewith, that it had before. What were the rules and regulations which the General Assembly might enact and provide?

Manifestly they were of the same class, character and quality which the company had before had the right to make, under the grant in its charter, of the right to make rules and regulations of management, and were to have respect to the police of the road, and nothing else.

The words must be so so interpreted, says the judge, "as to effectuate the intention of the parties."

Acts are generally the best interpreters of intentions. What the parties actually did, is the very best evidence of what they intended to do; and their actions, in this case, unequivocally indicate what the one party intended by making the reservation, and what the other intended by agreeing to become subject to it.

The road went into operation, and commenced the transportation of freight and passengers in December, 1854, so that at the passage of the law, accepting the land-grant, and directing the application of the lands to the construction of the roads, this road had been in operation for eighteen months, during all which time, the company had, with the knowledge and acquiescence of the State authorities, claimed and exercised the right of fixing the rates of fare and freight. It claimed and exercised it as a right secured to it by its charter, and the claim was not contested. Now, had it been the intention of the legislature to demand from the company the relinquishment of

this right, apt language would certainly have been used to express that intention, instead of leaving it to be deduced by a forced and unnatural construction of the general words, " rules and regulations;" and care would have been taken to exclude from all other parts of the act, any recognition of the continuance of the right in the company.

On the contrary, other sections of the act recognize in explicit terms, the right of the several companies mentioned in the act, to fix and control their own tariffs of charges.

The Iowa Central Air Line Railroad Company was authorized to construct a branch road; and the seventh section of the act provided that the company should " never " give any preference to the main line of said road, or any " part thereof, as defined in their articles of incorporation, " by business arrangements, *tariff of prices*, or otherwise, " over the said branch of their railroad."

The ninth section provided that passengers and freight from intersecting roads, should be carried " whether said " passengers or freight are brought by the roads benefited " by this act, or any other road or roads now constructed, " or which may hereafter be constructed, and at *such rates* " *as shall not, in any case, exceed the regular tariff of* " *charges* on such road or roads."

If any doubt can remain that, in the contemplation of the contracting parties, the words " rules and regulations " in the act were intended to apply to the police of the road only, and not to the tariff of rates, that doubt must totally disappear in the presence of the practical construction which the parties themselves gave to the law, as manifested in various acts of legislation by the one party, and the management of the road and its affairs by the other.

It has already been stated that, at the passage of this act, a portion of the road had been in use for eighteen months, and that persons and property had, for that length of time,

been transported over it under tariffs of rates fixed and controlled by the company; and that no question of the right of the company in that regard had ever been made. After the passage of the act, the road was completed the entire distance from Burlington to the Missouri River; and the company went right on with its management as before, fixing its own tariff of rates, and no one complaining or calling in question its right to do so.

In the meantime, the legislature passed laws prescribing many "rules and regulations" relating to the police of the railroads in the State, requiring the companies to fence their roads, to build cattle-guards, make crossings, make reports to the General Assembly, &c., all which it was competent for them to do; but they made no claim of power over the tariff of rates, nor any attempt at the exercise of such authority. On the contrary, by repeated acts of legislation, they admitted the right to be with the company, and prescribed certain police rules and regulations as to the time and manner of its exercise.

On the 8th day of April, 1862, the legislature passed an act requiring the railroad companies of the State, under heavy penalties, in the month of September, annually, to "fix the rate of fare for passengers and freights," and on the first of October following, to put up at all the stations and depots "a printed copy of such fare and freight, "and cause a copy to remain posted during the year." (Session Acts, 1862, 197.)

It is noticeable that this act does not purport to confer the authority upon the company, but assumes it to be a pre-existing right in the company, under its charter.

Nor does it assume to control, restrain, or limit the company in respect to its tariff of rates, but keeps clearly within the boundary which separates the police power from the power of contracting.

This law continued unchanged for eight years. It was then, on the 14th day of April, 1870, re-enacted, with the

single change that the rates should be fixed in June of each year, and put up at the stations and depots on the first of July, annually. (Session Acts, 1870, 179.)

In 1873, this law was re-enacted, and still stands among the statutes of the State. (Code of 1873, 239, unrepealed.)

But this is not all. There is still other and further legislation which shows, to clear and absolute demonstration, that the legislature never supposed or pretended that by reserving the power to make "rules and regulations," they had secured control over the rates of fare for transportation.

The eighth section of the land grant act, in which railroad companies are required to submit to such rules and regulations as the General Assembly might, from time to time, prescribe, fixed the time in which the several roads should be completed; and then provided that, in case of failure so to complete them, it should "be competent "for the State of Iowa to resume all rights conferred by "this act, upon the company so failing, and to resume all "rights to the lands hereby granted, and remaining undis-"posed of by the company so failing to have the length "of road completed, in manner and time as aforesaid." (Revision, 1800, 216.)

The Mississippi and Missouri Railroad Company was one of those to which lands had been granted by the above-mentioned act, and which, by the terms of the grant, was thereafter to be subject to such "rules and regulations" as might, from time to lime, be enacted and provided by the General Assembly. This company made default. It failed to construct the road as required; and, on the 11th day of February, 1868, the legislature passed another act, resuming the lands, and re-granting them, making it a condition that the company accepting the provisions of the act, should, at all times, be subject to such rules, regulations and *rates of tariff for transportation of freight and passengers*, as might, from time to

time, be enacted and provided by the General Assembly of the State of Iowa. (Session Laws, 1868, 13.)

On the 7th day of April, 1868, a grant was made to the Iowa Falls and Sioux City Railroad Company, with a condition, in the same exact language, that the company should be subject to such rules, regulations and *rates of tariff for the transportation of freight and passengers* as the General Assembly might provide. (Session Laws, 1868, 167.)

On the 31st day of March, 1868, two other acts were passed--one making a grant of lands to the Des Moines Valley Railroad Company, and the other to the McGregor & Sioux City Railroad Company, in both of which acts was inserted the condition that the companies should be subject to such rules, regulations, and *rates of tariff for the transportation of freight and passengers* as the General Assembly might provide. (Session Acts, 1868, 66, 68.)

Again, on the 12th day of April, 1870, an act was passed to authorize local taxation in aid of railroads, the fourth section of which is as follows :

" All railroads constructed by and with the aid of any " taxes levied and collected under the provisions of this " act, shall be subject to the control of the General Assem- " bly in regard to the management of the same, and *the* " *charges for the transportation of freight and passengers* " *thereon.*" (Session Laws, 1870, 106.)

When Moses had made an end of writing the words of the law in a book, he commanded the Levites to take it, and put it in the side of the ark of the covenant of the Lord their God, that it might be there as a witness against them forever.

Let these laws, deliberately passed by the General Assembly of the State of Iowa, stand an unimpeachable witness forever between the State and the company, as to

what the parties meant and intended by the words " rules and regulations " in the condition to the land grant act.

It was not till March, 1874, that the General Assembly put forward the claim of control over the rates of transportation on the Burlington & Missouri River Railroad.

For more than twenty years that control had been claimed by the company under its charter, and exercised by it without challenge. The State not only acquiesced, but by successive acts of legislation, running through all that period, and by judicial decision, put the same construction upon the charter contract, and the reservation in the land grant act, and recognized the right of fixing the rates as one belonging to the company.

In respect to other railroad companies in the State, control over the rates of transportation is reserved in express terms.

In regard to the appellant company, there is no such reservation, and no claim of such power, till at the end of twenty-two years after the incorporation of the company, the State, for the first time, insists upon a new construction of the charter, by which the company is to be deprived of one of its most valuable contract rights.

I feel, then, justified in asserting that, under the charter contract as understood by the parties at the time it was made, and as construed and acted upon by them through all the years that have since elapsed, the right to make its own contracts for transportation was with the company, free from legislative interference, and that it did not surrender that right by becoming subject to such " rules and regulations " as the General Assembly might, from time to time, enact and provide, even if it were conceded that it was competent for the legislature to encumber the congressional land grant with such a condition.

But the scope, force and effect of the words " rules and

regulations," when used in such connection, and in respect to such subject-matter as here, is not a question of first impression.

Able judicial tribunals have had occasion to consider and construe them, and to declare, in clear and emphatic terms, the full extent of legislative power that could be claimed and exercised, by virtue of such a reservation.

We do not, therefore, rest our argument wholly upon the intentions of the parties, as indicated by the practical construction which they gave to their own contract, but also upon adjudications fixing the true legal meaning, purport and effect of the words, independent of the action of the parties under them.

The City of New York granted to a corporation the franchise to have and enjoy the use of certain streets and avenues for the purpose of constructing and operating thereon a railroad for the convenience of public travel.

By the terms of the grant the company was required to "comply with the regulations of the street commissioners "and the common council, in building the road and running the cars thereon, and also such other regulations or "ordinances as may be passed by the common council relating to the road."

Under this reserved power the common council made a "regulation or ordinance," requiring the proprietor of every passenger railroad car running in the city of New York below 125th street, to procure license from the mayor for each car, and pay annually therefor a fee of fifty dollars.

The company refused obedience to this ordinance, and the city brought suit to recover the penalty.

The court held the ordinance to be void. Counsel who argued the case for the city did not contend that the reserved power extended beyond the police of the road, but insisted that the ordinance was only the exercise of the ordinary police power of the common council.

The court held that the reserved right to make regula-

tions or ordinances relating to the road was only a reservation of the police power, but that the ordinance in question was not a police regulation.

The language of the court is: "The plaintiffs must "show, however, that the subject of the ordinance, which "they are seeking to enforce, is one over which they have "authority to legislate, and that it is a regulation of police "and internal government, and not the mere imposition of "a duty or sum of money for the purposes of revenue."

"Regulations of police are regulations of internal or "domestic government, forbidding some things, and en- "joining the performance of others, for the security and "protection, and to promote the happiness of the gov- "erned."

"It is in vain, therefore, to speak of it, or to treat it as "a license, or a regulation of police. It is the imposition "of an annual tax upon the company, in derogation of its "rights of property, and on that account, is unlawful and "void."

Mayor &c. v. *Second Ave. R. R. Co.*, 32 N. Y., 261.

The same question came again before the court, in

Mayor &c. v. *Third Ave. R. R. Co.*, 33 N. Y., 42,

when the court again said, in respect to the ordinance:

"It was not the exercise of the power of municipal reg- "ulation reserved by the terms of the grant, and which "the common council had no authority to alienate; but it "was simply an attempt by one of the parties to a con- "tract to revoke a provision inserted for the benefit of the "other."

The only case referred to by the learned and able judge who decided this case below, in support of the position that the words, "rules and regulations" "satisfactorily

" evince a purpose of subjecting the companies to the con-
" trol of the legislature," is

Hamilton v. *Dillon*, 21 Wall., 86.

There is no analogy between that case and this. There is no principle common to them. There, the government, in the legitimate exercise of its war powers, made rules and regulations upon a subject over which it had full, unlimited, and exclusive dominion, which, so far from interfering with pre-existing rights, or limiting or restraining the free use and enjoyment of property, conferred rights, privileges and immunities upon all who chose to accept of them, to which they were not before entitled.

They were not rules and regulations of confiscation, but of acquisition. They were not to deprive a party of something he already owned, but to enable him to become the owner of something which, without them, he would have no right to acquire.

They were not to deprive him of the right of contracting with his neighbors in respect to his own property, but to enable him to contract with rebels, with whom he had, otherwise, no right to hold intercourse, and with respect to property which, but for the rules and regulations, he dared not touch. They impaired no right, and coerced nobody to submission. If anybody became subject to them, it was by his own free and voluntary act. He was, in all things, as free an agent, after the rules and regulations as before, and incurred no forfeitures or penalties by refusing to come under their operation.

How different from the case here, where one party to a private contract makes a rule or regulation by which that contract is changed in a material and important feature; the right of the other party to contract taken away—its property confiscated, and it subjected to heavy pains and penalties for refusing submission.

But we have the important admission that the words, " rules and regulations," in the land grant act must be so

interpreted, " as to effectuate the intention of the parties," and if this be done, the appellant will be abundantly satisfied.

2. But it is contended, in the second place, that by the constitution of the State, adopted in 1857, there is reserved to the General Assembly the power to amend or repeal all laws for the organization of corporations; and that, as the charter of the Burlington and Missouri River Railroad Company has been amended in several respects since the adoption of the constitution, the charter has thereby become subject to amendment or repeal, at the will of the legislature, and without the consent of the corporation.

To this proposition several satisfactory answers may be made.

1. The constitution is prospective.

It could not have been made retroactive upon contracts, nor was there any intention or attempt to make it so. Its language is, (Art. 8, § 1): " No corporation shall " be created by special laws; but the General Assembly " shall provide by general laws for the organization of all " corporations hereafter to be created, except as herein- " after provided."

ART. 8, § 12. " Subject to the provisions of this arti- " cle, the General Assembly shall have power to amend or " repeal all laws for the organization or creation of corpo- " rations, or granting of special or exclusive privileges, or " immunities, by a vote of two-thirds of each branch of " the General Assembly; and no exclusive privileges, ex- " cept as in this article provided, shall ever be granted." (Revision of 1860, 999, 1000.)

" Shall have power to amend or repeal all laws for the " *organization* or *creation* of corporations "—that is, to amend or repeal all laws which might thereafter be passed for the organization or creation of corporations.

Laws which had been previously passed had become, as to all corporations which had come into existence under them, contracts with such corporations, and were as effectually protected from amendment, alteration, or repeal, by a constitutional convention, as by a State legislature.

The constitution could act only on the future—not upon the past; only upon corporations thereafter to be created or organized—not upon those which had a previous existence.

Now the Burlington and Missouri River Railroad Company was neither created nor organized under laws passed subsequent to the adoption of the new constitution, but existed by previous contract, and was not, therefore, subordinated to legislative control by the provisions of the constitution. Concede the charter to have been amended after the adoption of the new constitution, the company did not thereby expose itself to deprivation, at the will of the legislature, of its pre-existing charter privileges; for the distinction between a new charter, and the amendment, or even renewal of an old one, is fully recognized by authority.

The amendment or continuance of an old charter is not the creation or organization of a new corporation, and it is said that in pleading, the latter act need not be noticed, the vitality and authority of the corporation being derived from the former one.

The People v. *Marshall*, 1 Gilm., 683.

2. The only amendments made to the charter since the adoption of the new constitution are :

(1.) To authorize the company to issue preferred stock.

(2.) To authorize an increase of the capital stock, and an increase of the liabilities of the company.

(3.) To insert, in article ten of the original articles of incorporation, the words, "or points."

Only one of these, the first, giving authority to issue

preferred stock, was provided for by a law passed after the adoption of the new constitution. The law was passed March 12th, 1864, and the amendment made April 28th, 1864.

The law simply provided that thereafter it should "be "lawful for any railroad company, incorporated within "the State of Iowa, with the assent of the stockholders of "such company, to make and issue preferred stock in "payment of debts due or to become due from such com- "pany, &c." (Session Acts, 1864, 44, §§ 1 and 2.)

These sections embraced this one subject only. They had no greater scope. Their only object was to confer upon the company an additional privilege, not specifically provided for in the original charter. There were no conditions attached, by which the franchises of the company were afterwards to be held at the pleasure of the legislature. It was not in the thoughts or intentions of either of the contracting parties, the State or the company, that by doing a perfectly lawful, proper and necessary act, to which it was specifically invited by the law, the company would forfeit its right thereafter to make contracts with its employees for compensation for services rendered. Nor was it ever claimed, for ten years after, that such a result had been accomplished.

For ten years after, the company went on as before, fixing its tariff of rates, and collecting the fares so fixed, not only with the acquiescence of the legislature, but with its repeated affirmative recognition of the right, by the passage of laws, from time to time, to compel the company to do so. The only and sole purpose of the law was to confer upon the company an additional right, not before expressly provided for. The object was to do a public benefit, by giving the preferred stock a legislative as well as corporate sanction, and thus to encourage investments, by which the company would be enabled to go forward to completion with the great work it had in hand; not to

cripple and destroy it by depriving it of one of the most important and valuable powers which its charter contract with the State conferred. It would be a violation of all the canons of legal interpretation to give to this law any such effect as is claimed for it by the appellee. Some better reason than is furnished by this amendment of the charter must be found for now declaring against the company the forfeiture of a right, which, by the admission of all parties, it has possessed, and lawfully exercised, under its contract with the State, for more than twenty years.

3. For another and conclusive reason, the proposition that by amending its charter, the company has surrendered to the legislature control over its franchises, cannot be maintained.

It is but a truism to say that the company could not forfeit any of its powers or privileges by doing what its charter authorized to be done.

The amendments which have been made were all appropriate to the nature and business of the corporation. They were all *in pari materia* with the original charter. They were all necessary to enable the company to effectuate the purposes of its creation; and the charter gave to the company the unlimited and uncontrolled right to make such amendments, in its discretion.

No additional authority, no legislative act, was necessary to enable it to do so, and no law passed by the General Assembly could enlarge, or limit or restrain the right, or impose conditions, or attach forfeitures to its exercise, without the consent of the company. It was a right for which the company contracted with the State; for which it paid a consideration, and which could not be taken from it without its consent.

At the risk of repetition and prolixity, I deem it necessary again to call the attention of the court to the pro-

visions of the law which existed at the organization of the company, and to the charter, of which these laws were a part.

"Among the powers of such body corporate, are the "following: * * *

"To make contracts, acquire and transfer property, "possessing the same powers in such respects as private "individuals now enjoy.

"To establish by-laws, and make all rules and regula- "tions deemed expedient for the management of their "affairs, in accordance with law, and not incompatible "with an honest purpose.

"Previous to commencing any business, except that of "their own organization, they must adopt articles of "incorporation, which must be recorded in the office of "the recorder of deeds of the county where the principal "place of business is to be, in a book kept therefor.

"Corporations for the construction of any work of "internal improvement, must, in addition, also file a copy "of such articles, in the office of Secretary of State, and "have the same recorded by him in a book kept for such "purposes. Such articles of incorporation must fix the "highest amount of indebtedness or liability to which the "corporation is, at any one time, to be subject, which must "in no case, except in that of the risks of insurance com- "panies, exceed two-thirds of its capital stock.

"A notice must also be published, for four weeks in "succession, in some newspaper, as convenient as practi- "cable to the principal place of business.

"Such notice must contain:

"The name of the corporation, and its principal place of "transacting business. The general nature of the busi- "ness to be transacted.

"The amount of capital and stock authorized, and the "time and conditions on which it is to be paid in. * * *

"The highest amount of indebtedness or liability to

" which the corporation is, at any time, to subject itself.
" * * *

" No change in any of the above matters shall be valid,
" unless recorded and published as the original articles are
" required to be." (Code, 1851, Chap. 43.)

Thus authorized, the company prepared and filed its articles of incorporation, which were accepted by the State authorities, as in conformity with the law, and recorded, and under which the company has ever since existed and acted.

The sixteenth article of this charter is as follows:

" These articles of association may at any time be
" changed by the unanimous consent of the whole board
" of directors, or they may be changed by the vote of the
" stockholders, at any general or special meeting, provided
" that not less than four weeks' notice of such change,
" specifying its exact character, be given immediately
" prior to such meeting, in two newspapers printed in
" Burlington, and in such other manner as the directors
" may prescribe."

Thus it is seen, that every amendment which the company has made, was in respect to a matter of which it had full, complete and entire control by its charter, and which was fully authorized by its original contract with the State.

And it is wholly immaterial whether they were made before or after the adoption of the new constitution. It was a charter right which a constitutional provision could no more annul than could an ordinary act of legislation.

Nor could a constitutional convention attach any conditions or consequences to the exercise of the right, which did not pertain to it in the moment of its creation.

Nor was the previous consent of the legislature necessary to enable the company to make the amendments. The right was one of the franchises of the charter. The

legislature could not take it away; nor could they, by passing a law to authorize an amendment, which the company could make without such authority, subordinate the company to any new or additional control, or impose upon it any new duties or liabilities.

And that this company had the right, by the very terms of its contract with the State, to make amendments in furtherance of the objects of its creation, without awaiting legislative authorization, has been expressly decided by the Supreme Court of Iowa, in the case of *The B. & M. R. R. R. Co.* v. *White*, 5 Iowa, 411.

The company then, having made no amendments, except such as it had the right to make by the terms of its original contract with the State, has not, by the adoption of such amendments, forfeited or relinquished any power which its charter, and the law then in force conferred; and, inasmuch, as the right to fix its tariff of rates was one of its powers then, it is one of its powers now, which the State can neither take away nor impair.

If anything further is deemed requisite upon this branch of the subject, it can only be to call the attention of the court to a decision of the Supreme Court of Iowa, which not only concedes to the company the right, under its charter, to fix its tariff of rates, and to direct the time, place and manner of their payment, but affirms the continuance of that right in the company, after the passage of the land-grant act, and after the adoption of the new constitution.

The land-grant act was passed July 14, 1856.

The new constitution was adopted in convention, March 5th, 1857, and ratified by the people, August 3d, 1857.

In November, 1858, the case of *The State of Iowa* v. *Chovin* came before the Supreme Court for hearing, and was decided.

Chovin was a conductor on the Burlington and Missouri

River Railroad. He expelled a passenger from the cars for refusing to pay the fare fixed by the company, for which he was prosecuted for assault and battery; and, as a matter of course, convicted in the court below.

In reversing the judgment, the Supreme Court said: "For the proper management of its affairs—the better to "secure the safety and security of passengers, and to facili- "tate the business and labors of its agents and officers— "the company has power to make reasonable regulations "to guide and govern its agents in the discharge of their "duties, and for the conduct of passengers while in its "trains. * * *

"And to this we may add, that all regulations will be "deemed reasonable, which are suitable to enable the "company to perform the duties it undertakes, and to "secure its own just rights in such employment; and also "such as are necessary and proper to insure the safety, "and promote the comfort of passengers. * * *

"If the company may establish fares, so it may regu- "late the time, place and manner of receiving the same, "and direct to whom payment shall be made. And, as "before remarked, every reasonable regulation of the "company may be enforced; for the right and power to "make, carries with it the right and power to compel its "observance.

"And if any one shall, without sufficient cause, refuse "this observance, he may, if necessary, be removed from "the train. * * *

"It is sufficient for the disposition of this case to de- "termine, as we do, that the regulation of the company, "as to the payment of the fare, was a reasonable one; "that the passenger failed to comply with it, and for this "failure showed no sufficient excuse; and that, under "such circumstances, the conductor had a right to eject "him from the cars."

The State v. *Chovin*, 7 Iowa, 204.

This legislative, judicial and practical construction of the charter, continued through a period of more than twenty years, ought to be sufficient to establish, upon a firm foundation, the right of the company to the franchise of fixing its own tariff of rates.

IV.

Having, as I trust, succeeded in establishing the propositions that under its charter, the railroad company had the right to demand and receive compensation for the transportation of persons and property over its road, and to fix the rates of such compensation, and that that right has never been forfeited or surrendered, I shall endeavor now to show that the act of the Iowa legislature, entitled "An "act to establish reasonable maximum rates of charges "for the transportation of freight and passengers on the "different railroads of this State," approved March 23, 1874, impairs the obligation of the charter contract; of the contract between the company and the stockholders, bondholders, and mortagees; and between the Burlington and Missouri River Railroad Company and the appellant.

The act provides for classifying the roads of the State, and then prescribes the maximum rates for passengers and freight on the roads of each class, and subjects the officers and employees of all railroad companies in the State to prosecution for a violation of the law, and to punishment by fine and imprisonment in the event of conviction.

The law will be found in the Session Acts of Iowa, 1874, page 61; but so much of it as is material to this case is here copied:

"SECTION 1. *Be it enacted by the General Assembly of* "*the State of Iowa*, That all railroad corporations organ- "ized or doing business in this State, their trustees, re-

" ceivers or lessees, under the laws or authority thereof, " shall be limited in their maximum charges to the rates of " compensation for the transportation of passengers and " freight, which are herein prescribed. All railroads in " this State shall be classified according to the gross " amount of their respective annual earnings within the " State per mile for the preceding year, as follows: Class " 'A' shall include all railroads whose gross annual earn- " ings per mile shall be four thousand dollars, ($4,000,) or " more. Class 'B' shall include all railroads whose " gross annual earnings, per mile, shall be three thousand " dollars, ($3,000,) or any sum in excess thereof less than " four thousand dollars, ($4,000.) Class 'C' shall include " all railroads whose gross annual earnings, per mile, shall " be less than three thousand dollars, ($3,000.)

" SEC. 2. All railroad corporations, according to their " classification as herein prescribed, shall be limited to " compensation per mile for the transportation of any " person, with ordinary bagge, not exceeding one hun- " dred pounds in weight, as follows: Class 'A,' three " cents; class 'B,' three and one-half cents; class 'C,' " four cents; *Provided*, that no such corporation shall " charge, demand, or receive any greater compensation " per mile for the transportation of children twelve years " of age, or under, than half the rates above prescribed; " *and provided*, also, a charge of ten cents may be added " to the fare of any passenger, when the same is paid upon " the cars, if a ticket might have been procured within a " reasonable time before the departure of the train.

" SEC. 3. The tariff rates established in the following " schedule shall be considered the basis on which to com- " pute the compensation for transporting freights, goods, " merchandise or property over any line of railroads within " this State."

Here follows a long schedule of tariff rates, giving in

detail the rate per mile for every separate article which is likely ever to be transported over a railroad.

"SEC. 4. It shall be unlawful for any railroad corporation to charge, demand, or receive a greater compensation for transporting merchandise or property over a line of railroad of class 'A' than ninety per cent. of the rates established in the schedule of section three of this act, and it shall be unlawful for any railroad corporation to charge, demand, or receive a greater compensation for transporting goods, merchandise or property over a line of railroad of class 'B' than five per cent. in addition to the rates established in the schedule of section three of this act. And it shall be unlawful for any railroad corporation to charge, demand, or receive a greater compensation for transporting goods, merchandise or property over a line of railroad of class 'C' than twenty per cent. in addition to the rates established in the schedule of section three of this act.

"SEC. 5. The following classification of freights, explanatory to the preceding schedules, shall be taken and held to be the classification in force in this State under the provision of this act:"

This is followed by another long schedule, in which every separate article of property and commerce is classified.

"SEC. 8. Where any prosecution or action for the violation of any of the provisions of this act, in relation to the transportation of passengers or freight, shall be commenced, it shall be the duty of the Governor, when notified thereof, and requested by the person or persons commencing the prosecution, or action, supported by a recommendation of at least twenty tax payers of the county where the violation occurred, to employ suitable counsel, if he deem it necessary, to conduct or assist in conducting the same; and the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated

" out of any money in the treasury, for compensation for such " counsel, and to pay any incidental expenses necessary " to carry on said prosecution or action. Such compensa- " tion and incidental expenses shall be audited and allowed " by the Auditor of State on the certificate of the Execu- " tive Council that services were actually performed, " and such incidental expenses necessary, and that the " sums in such certificates were reasonable for the service " rendered. And when thus certified and allowed, it shall " be paid by the Treasurer of State out of said appropria- " tion, less whatever amount may be allowed by the court " or courts, and included in the judgment as attorney's fees.

" SEC. 11. Any officer, agent or employee of any rail- " road company, person or corporation, operating a line of " railroad within this State, who shall violate or be a party " to the violation of any of the provisions of this act, or in- " strumental therein, shall be guilty of a misdemeanor, and " shall, on conviction thereof, be punished for every such " offense by fine not less than twenty dollars, nor more " than one hundred dollars, or by imprisonment not less " than five, nor more than thirty days ; or any such per- " son, corporation or railroad company as aforesaid, who " shall authorize, direct, cause, permit, or allow any viola- " tion of the provisions of this act by any officer, agent or " employee, such railroad company, person or corporation " shall forfeit and pay to the person injured five times the " amount of compensation or charge illegally taken or de- " manded, or five times the amount of damage caused, as " the case may be, to be recovered with a reasonable at- " torney's fee by such person in a civil action in any court, " or before a justice of the peace, as the case may be, of " this State ; and if an appeal be taken from the judgment " or any part thereof, it shall be the duty of the appellate " court to include in the judgment an additional reasonable " attorney's fee for services in the appellate court or courts ; " and for every such violation, such railroad company, per-

" son or corporation, shall forfeit and pay to the State of " Iowa, for the use of the school fund, the sum of five hun- " dred dollars, to be recovered in any civil action in the " name of the State ; and it is hereby made the duty of the " attorney general of the State and of the several district " attorneys within their respective districts to sue for and " recover all sums forfeited as aforesaid.

" SEC. 12. The terms ' railroad corporation ' and " ' railroad company " contained in this act, shall be deemed " and taken to mean all corporations, companies or indi- " viduals now owning, or which may hereafter own or ope- " rate any railroad, in whole or in part, in this State ; and " the provisions of this act shall apply to all persons, firms " and companies, and to all associations of persons, whether " incorporated or otherwise, that shall do business as com- " mon carriers upon any of the lines of railways in this " State (express companies and street railways excepted) " the same as to railroad corporations hereinbefore men- " tioned.

" SEC. 13. All acts or parts of acts inconsistent with " this act are hereby repealed.

" APPROVED, March 23, 1874."

The power to make a tariff of rates, and to enforce its adoption and observance by the company, is thus assumed by the State ; and the company is imperatively forbidden, under pains and penalties, longer to exercise the right. This law takes it from the company, and transfers it to the State.

That this is an impairment of the obligation of the contract, in an important and material part, is demonstrated by a mere statement of the case, assuming the contract to be what I have endeavored to show it. If it was, as contended, the right of the company, under the charter, and the laws which then existed, to make its own contracts for compensation for transportation over its road, then there could be no grosser or more flagrant interference

with the obligation of the contract, than by a law which absolutely takes away the right in its totality, and transfers it to another, and compels the company, under severe penalties, and against its consent, to render services at such prices as that other may arbitrarily prescribe.

I think I may claim that it has been conclusively shown by the long, uniform and unchallenged practice of the company; by a continuous series of legislative acts, extending over a period of more than twenty years; and by the judicial decisions of the tribunal of last and final resort, in the State of Iowa, that the full power to regulate the rates of compensation for transportation was with the company, under its charter, and, as hereinbefore remarked, this power was exclusive.

It was so, from its very nature and objects, and the necessary implications growing out of its exercise. Full power to regulate a particular subject implies the whole power, and leaves no residuum; and a grant of the whole to one, is incompatible with a grant to another of any part of the same power. When, therefore, the legislature, by itself, or by its agents, appointed for that purpose, proceeds to regulate the tariff of rates for the carriage of persons and property, they are doing the very thing which the company is authorized, by its charter, to do, and which cannot be done, at the same time, both by the State and the company.

C. J. MARSHALL, in *Gibbons* v. *Ogden*, 9 Wheat., and Mr. J. STORY, in *City of New York* v. *Miln*, 11 Pet., 157–8. Judge STORY's was a dissenting opinion, but the nature of an exclusive power to regulate a given subject was not the point of dissent.

To recognize the power, then, as existing in the State, is to deny it to the company; and to deny it to the company, is to repeal its charter, *pro tanto*, and to impair the obligation of its contract with the State, by depriving it of one of the most valuable privileges granted by the charter.

But this is not the only contract which the law violates. The company is not the only party whose rights are invaded.

Third persons have acquired vested interests in the charter of the company, as it originally existed, of which the legislature cannot deprive them. Indeed, the parties to the charter contract, the State and company, could not be permitted to make any modifications of the charter which would materially impair the rights which others have acquired in it, without the grossest bad faith.

At the time this road was projected, the country traversed by it, though naturally fertile, beautiful and inviting, was but sparsely populated. Settlements had extended but little beyond the margins of the groves. The vast expanse of rich, alluvial prairie was substantially an uninhabited, uncultivated desert, contributing a mere pittance to the wealth and revenues of the State. There were no means of transportation, save such as the farmer could supply for himself by the use of horses and oxen, and carts and wagons, over the natural roads of the country, which were many times impassable, and, in consequence of which, much of the then small production of the country went to waste upon the fields where it grew.

The community was suffering, in all its interests, for the want of channels of trade and travel, and it was of vast importance to the growth and prosperity of the State at large, that the road should be built.

But the company was without means; and the bill alleges that it borrowed many millions of dollars with which to build and equip the road, and that to secure the repayment of the money thus borrowed, it mortgaged the road, with all its appurtenances, furniture, rolling stock, &c., and all its franchises derived from the State, including the right to fix the rates of fare for transportation upon the road.

These mortgages are still outstanding and unpaid in the hands of *bona fide* holders. The company had full authority to mortgage its property and franchises; and, by the laws of Iowa, when the mortgages shall be foreclosed, and the franchises sold, the purchaser becomes invested with all the rights, powers and privileges of the original corporation.

The bill alleges that the persons who loaned the money with which the road was built and equipped, and to secure the repayment of which the bonds and mortgages were executed, did so in reliance upon the earnings of the road to repay the money, and in the full confidence and belief that the right of the company to fix and control the tariff of charges for transportation, would never be denied or interfered with; and that had it been known, believed or suspected, that the General Assembly would attempt to deprive the company of such right, and itself claim and exercise the power of controlling the company in this regard, and of changing and altering the rates of charges at pleasure, irrespective of the tariff established by the company, and of compelling the company by pains and penalties, to adopt and conform to such rates as might, from time to time, be prescribed by the legislature, money could not have been obtained, and the road would not have been built.

This allegation of the bill is not denied by the answer. It stands then admitted before the court, that the franchise, which gave to the company control over the rates of fare, was the feature of the contract between the State and company, which, above all others, secured the success of the undertaking, for which the company was incorporated, and which both State and company had so much at heart.

Capitalists will not adventure money in railroads which are under the absolute dominion of legislatures. Such roads cannot be managed with success. The entire value of the property may, at any time, be totally destroyed; or,

if not destroyed, its enjoyment is exposed to so many harassments, vexations, and annoyances, as greatly to depreciate its value, and defeat its successful and profitable use.

But, however this may be, it is enough to say here, that, at the time the bonds of the company were issued and negotiated, and the mortgages made of the franchises of the company, the charter had received a legislative, judicial, and practical construction, which acknowledged the right to fix the rates for transportation to be in the company; that the company was in the full and undisputed possession and enjoyment of the right; and that the bonds were sold, and money obtained to build the road, upon the faith of that construction.

It is too late now for the State to change it, to the prejudice of those who were induced by it to advance their money, and take a mortgage upon that very right as security.

The bill further avers that when the complainant company entered into the contract with the Burlington and Missouri River Railroad Company, whereby it became the lessee of the road, the Burlington and Missouri River Railroad Company, had the right to fix, determine and establish the tariff of rates for transportation, and that it had always theretofore exercised the right without question of its power and authority to do so; that this right, power and privilege were, by the lease, assigned, set over and transferred to the appellant; and that, as the consideration for the lease, including the franchise of controlling the rates of transportation, the appellant entered into a covenant to keep the road equipped, and maintain and operate it in such manner, as to furnish reasonable accommodations to the public; to pay all taxes and assessments on the road and property; to pay all debts and liabilities of every nature, both principal and interest; and to make to the stockholders of the Burlington and Missouri River Railroad

Company, the same amount of dividends, per share, which it should make to its own stockholders, &c., all which covenants and undertakings the appellant has faithfully kept and performed.

This allegation is not denied, and is, therefore, for the purposes of this case, to be taken as admitted.

Thus, then, the case stands before this court: That, at the time the contract of lease was entered into, between the Burlington and Missouri River Railroad Company, and the complainant company, the former company had been in existence for twenty-one years, lacking a few days; that during all that time no conflict had arisen between the company and the State, as to the power, and privileges conferred upon the company by the charter, but that both parties concurred in the construction which conceded to the company the right to fix and control its tariff of rates, without interference by the State; that the one party had, through all that time exercised the right, and that the other had admitted its authority to do so, not only by acquiescence, but also by many affirmative legislative and judicial acts of recognition; that upon the faith of this construction, third persons have invested many millions of dollars in the enterprise which they would not have done under a different interpretation of the charter; that on the faith of that construction the complainant took a lease of the road, and of the franchises, including the right to fix the tariff of rates, and as a part of the consideration, therefor, agreed to pay to the State a large amount of annual taxes and assessments; that this was done with the full knowledge of the State authorities, who have since accepted the payment of the annual taxes upon the road, and its appurtenances and franchises, from the appellant; that after the making of the lease, the State again put a legislative construction upon the charter, acknowledging the right of the company, under the charter, to fix the rates of fare for passengers and freight, by passing a law

requiring the complainant, under pains and penalties, to perform that duty in June, 1873, and annually thereafter; and that for more than two years after the making of the lease, the complainant did fix and regulate the rates of fare, without question of its right and power to do so. For more than twenty-two years, therefore, after the incorporation of the company, there was one uniform, unvarying, undisputed construction given to the charter by all parties, and the soundness of that construction is not even now questioned by anybody.

I do not understand it to be denied, but, on the contrary, fully admitted, that the charter conferred upon the company the right to fix the rates of fare, and that the company lawfully exercised that right from the day that it commenced operating its road, till the General Assembly chose to take it away by the act of March 23, 1874. We do not differ as to what the construction of the charter was. We all agree in that, and have agreed for more than twenty-two years. Down to the passage of this act, there was never but one construction suggested or insisted upon; and, that act out of the way, the construction would be the same now that it was before its passage. What that was, there is not now, and never has been, a controversy. The contention between us is, not as to what the contract *was*, but as to the right of one of the parties to that contract, to *annul, alter or amend it without the consent of the other;* and that, after third persons have acquired vested interests in it. Before the enactment of this law, the right to fix the rates of fare was, by the consent and agreement of all parties, with the company, and but for the law, would be now.

But, it is insisted that the right no longer exists, not because it did not exist by the contract as made by the parties, but because the law has taken it from the company, and vested it in the State. If this be the effect of the law, then, beyond controversy, it impairs the obligation of the contract. If, under the charter, the company had, and

exercised a right, power or privilege which it will no longer have, and can no longer exercise, if the law be enforced, then, beyond all doubt, the law impairs the obligation of the contract, and is null and void. The Court is thus brought face to face with the question, whether the legislature, without any reservation of the right to do so, can annul an important provision, admitted by all parties to have existed in the charter of a private corporation, and substitute another, and materially different one for it, without, and against the consent of the corporation.

The third persons who advanced the money to build the road, and took a mortgage upon it, and the franchises of of the company as security, had a right to rely upon the contemporaneous practical construction which had been given to the charter. Had they applied, as they probably did, for legal counsel, no lawyer would have hesitated so to advise them—to advise them that, upon a sale under the mortgages, the purchaser would acquire all the franchises, rights, powers and privileges, which, by such construction, had been conceded to the company, and that they could not be taken away or impaired by any subsequent act of legislation.

The contemporaneous and practical construction of constitutions and laws, have always had very great weight with the courts, even in cases which, but for such construction, would have been full of doubt and embarassment.

In *Stewart* v. *Laird*, 1 Cranch, 299, in answer to the objection that the Judges of the Supreme Court had no right to sit as Circuit Judges, the Court said: " It is sufficient to observe that practice and acquiescence under " it, for a period of several years, commencing with the " organization of the judicial system, affords an irresistible " answer, and has indeed fixed the construction.

" It is a contemporary construction of the most forcible " nature. This practical exposition is too strong and ob-

" stinate to be shaken or controlled. Of course, the ques-
" tion is at rest, and ought not now to be disturbed."

The Court said substantially the same thing, and with equal emphasis, in

Cohens v. *Virginia*, 6 Wheat., 118.
Bank of U. S. v. *Halstead*, 10 Wheat., 63.
Ogden v. *Saunders*, 12 Wheat., 290.
Surgett v. *Lapice, et al.*, 8 How., 68.

The same question came again before the court in *Ohio Life and Trust Company* v. *Debolt*, 16 How., 432, when Chief Justice TANEY said: " If a contract, when made, " was valid by the laws of the State, as then expounded " by all the department of the government, and adminis- " tered in its courts of justice, its validity and obligation " cannot be impaired by any subsequent act of the legisla- " ture of the State, or decision of its courts altering the " construction of the law."

The same thing was affirmed at a much later day in

Havemeyer v. *Iowa County*, 3 Wall., 294.
Thomson v. *Lee County*, 3 Wall., 331.
Larned v. *Burlington*, 4 Wall., 275.
City of Kenosha v. *Lamson*, 9 Wall., 477.
Olcott v. *Supervisors*, 16 Wall., 678.
Supervisors of Carroll County v. *United States*, 18 Wall., 71.

So, too, the appellant, in leasing the road and franchises, had a right to rely upon the long-settled construction of the charter as to the powers which were secured to the company by it. At that time no doubt of the right of the company to regulate its rates, free from legislative interference, had been suggested. No right of control in that regard had then been set up. Had it existed, the appellant would not have taken the lease, and have assumed the heavy obligations and responsibilities which it did. By its contract of lease, it engaged for the payment of all the outstanding bonds and mortgages of the lessor, amounting to

over seven millions of dollars ; of dividends on more than six millions of dollars of stock ; and of all taxes and assessments upon the road ; and the bill alleges that the means upon which the appellant relied, and upon which it had a right to rely, to enable it to perform these engagements, were the earnings of the road; and that if deprived of such earnings, or if compelled to operate the road under rules and regulations which would materially diminish the receipts, appellant would be unable to keep the road in repair and operation, and pay the taxes and assessments, the debt and interest, and reasonable dividends to the stockholders.

When the appellant made this contract with the Burlington and Missouri River Railroad Company and incurred these obligations, the latter company had and enjoyed the franchise of fixing the rates of transportation over the road. That franchise was, by the contract, transferred to the appellant. That contract the parties had full right and authority to make, and it was in all respects lawful and binding.

In execution of the contract, the appellant took possession of the road and its appurtenances, and entered upon the enjoyment of the franchise, which it continued to exercise for more than a year, when the law under consideration was passed, taking it from the appellant and transferring it to the State.

This cannot be done, even where the power of alteration and amendment is reserved.

In *Commonwealth* v. *Essex Company*, 13 Gray, 252, the question of the extent to which the legislature might go in imposing new duties upon corporations, or in limiting and restraining the exercise of such rights as were granted by the charter, where the power was reserved to the legislature to amend, alter or repeal the charter at pleasure, came directly before the court. Chief Justice SHAW said, in de-

livering the opinion of the court: "It seems to us that this "power must have some limit, though it is difficult to de- "fine it." And then, after putting some hypothetical cases in illustration of his argument, he announced his conclusion in the following language: "Perhaps from these "extreme cases—for extreme cases are allowable to test "a legal principle—the rule to be extracted is this: that "where, under power in a charter, rights have been ac- "quired and become vested, no amendment or alteration "of the charter can take away the property or rights "which have become vested under a legitimate exercise of "the powers granted."

I wish now to ask, first, whether the Burlington and Missouri River Railroad Company, by its charter, and the laws which existed when the charter was obtained, acquired the franchise to demand and receive compensation for the transportation of persons and property over its road, and to fix the rates of such compensation, by contract with its employers? If so, and I do not understand this to be denied, then a law which takes away, or diminishes the value of that franchise, impairs the obligation of the contract between the State and the company.

Second. Did the mortgagees who supplied the money with which the road was built, and took a mortgage on the road and the franchises of the company as security, thereby acquire a vested interest in the franchise of contracting for compensation for transportation upon the road? This question *must* be answered in the affirmative; and, if so, the law under consideration impairs the obligation of the contract between the Burlington and Missouri River Railroad Company, and the bond holders and mortgagees.

Third. Did the appellant, by virtue of its lease of the road and franchises of the Burlington and Missouri River Railroad Company, become entitled to demand and receive compensation for the transportation of persons and

property upon the road, and to fix the rates of such compensation by contracts with passengers and shippers ?

This question must also be answered in the affirmative; and, being so answered, it is clear, beyond all doubt or controversy, that a law which forbids appellant the enjoyment of that franchise, and imposes pains and penalties for its exercise, impairs the obligation of the contract between the appellant and the Burlington and Missouri River Railroad Company, and is unconstitutional, and null and void.

V.

The act of the Iowa legislature is a violation of that provision of the 14th amendment of the constitution of the United States, which declares that "No State shall make "or enforce any law which shall abridge the privileges "or immunities of citizens of the United States; nor "shall any State deprive any person of life, liberty or "property without due process of law, nor deny to any "person within its jurisdiction the equal protection of the "law."

By this amendment, rights which previously depended wholly on State constitutions and laws for their recognition, are now placed under the protection of the Federal government, and secured by the Federal constitution; and the Federal courts may now interpose and annul all acts and decrees of State legislatures which assume to take away rights or property without due process of law.

BLACKSTONE says: "The third absolute right of every "Englishman is that of property, which consists in the "free *use*, enjoyment and disposal of all his acquisitions, "without any *control* or *diminution*, save only by the laws "of the land." (1 B. C., 138)

Chancellor KENT says: "The exclusive right of *using* "and transferring property, follows, as a natural conse-

" quence, from the perception and admission of the right " itself." (2 Kent Com., 320.)

In *Wynehamer* v. *The People*, 13 N. Y., 433, it is said: " Property is the right of any person to possess, *use, en-* " *joy, and dispose of a thing*. The term, though frequeutly " applied to the thing itself, in strictness, means only the " rights of the owner in relation to it. A man may be " deprived of his property in a chattel, therefore, without " its being seized, or physically destroyed, or taken from " his possession. *Whatever subverts his rights in regard to* " *it*, annihilates his property in it."

Again in the same case—398:

" When the law annihilates the value of property, and " strips it of its attributes, by which alone it is distinguished " as property, the owner is deprived of it, according to the " plainest interpretation, and certainly within the spirit of " a constitutional provision, intended expressly to shield " private rights from the exercise of arbitrary power."

See also *Pumpelly* v. *Green Bay Co.*, 13 Wall., 177.

Income is property, as well as that out of which it proceeds, and by the same authority that the owner is deprived of the one, he may be of the other.

A man's farm cannot be taken from him without due process of law, nor can it be taken for public use without just compensation. But a farm is of no value, except for what it produces; and it is as gross an invasion of private right to deprive him of the rents and profits, as of the thing out of which they issue.

So of the mechanic; his skill is valuable only as he can make it profitable; and to take from him the wages of his labor, is as great a wrong as to prohibit him from laboring at all. The one deprives him of his liberty, and the other of his property. The enjoyment of both is guaranteed by the constitution; and any law which assumes to take

away or impair, or diminish either, is a violation of that instrument, and a nullity. Both the farmer and the mechanic have the right to make their own contracts; the one, for the price at which he will lease his farm; the other, for the price at which he will render his services; and a law which compels either to accept less than he could get by a fair contract, to be made by himself, is just as obnoxious to the constitutional objection as one which seizes upon the whole. The same thing is just as true of a railroad company as of the farmer and mechanic. The road is the property of the company, and cannot be taken from it, except by due process of law, or upon just compensation. The road is valuable only for its uses, for its earnings, for the profits which it yields; and they are as much the property of the company as the road itself. The company has the right to contract for its compensation; for the rates that shall be paid it; and any law which denies it that right, and compels it to accept less compensation than it would otherwise receive, deprives it of its property. There is no difference in such a law, and one which would permit the company to contract for its own rates for carrying, and then compel it to pay a part of its receipts into the public treasury, or distribute all above a fixed amount among the people. In this latter form, the law would hardly find an apologist — much less an advocate — yet, in practical effect, it would be no more injurious to the company, no more an invasion of private right, no more a confiscation of private property, than the law which has been enacted.

If the legislature were to pass a law providing, in direct terms, that the company should transport all persons and property offered for transportation without compensation, and enforce obedience to the law by heavy penalties, it would amount to a direct legislative confiscation of the property of the company to the State; and there would be no doubt of its unconstitutionality. This court would

interpose and prevent the enforcement of the law, and protect the company in its rights, and the control and enjoyment of its property.

Now, will a power be recognized and affirmed in the State to do by indirection, what it would be promptly and imperatively restrained from doing directly? If the legislature has the constitutional right of control over the tariff of rates of the company, it is a power to be exercised in the discretion of the legislature; and, when that body shall have acted in the premises, its action cannot be revised by any other tribunal; for, if the discretion exists at all, it is a legislative, a sovereign discretion, and in its very nature unrestricted and uncontrolled. (*The Baltimore and Ohio Railroad Co.* v. *Maryland*, 21 Wall., 471.)

If this be so, it is apparent that the legislature may, by the reduction of compensation to merely nominal rates, practically deprive the company of the beneficial use of its property; in fact, confiscate it, and leave the company utterly without remedy. It will hardly be contended that the legislature could accomplish such a purpose by the passage of a law which should declare, in express terms, that the road should be taken from the company and given to the public, or, what would be worse, that the company should continue to operate the road, for the benefit of the public, at a merely nominal compensation. But, if the legislature possesses the power claimed for it, it may, in this indirect way, accomplish the very result which it would not be permitted to effectuate by direct means.

In the License cases, 5 How., 576, this court said that, where the State did not possess the power to do a thing directly, it would be an unjust and unsound construction of the constitution which would enable it to accomplish precisely the same thing indirectly, under another name, and in a different form.

It is no answer to say that the State has not yet carried the regulation of rates to the extremity of full and entire

confiscation. This is not a question of the *abuse*, but of the *existence* of a power; and the argument is to prove that it does not exist, by demonstrating that if it does, it enables the legislature to do, by indirection, what it would not be permitted to do directly, namely, to take private property without due process of law, and without just compensatian.

In *Brown* v. *The State of Maryland*, 12 Wheat., 419, Chief Justice MARSHALL said: "There is no difference "in effect, between a power to prohibit the sale of an "article, and a power to prohibit its introduction into the "country. The one would be a necessary consequence of "the other. * * * It is obvious that the same power "which imposes a light duty, can impose a very heavy "one, one which would amount to a prohibition. Ques- "tions of power do not depend on the degree to which it "may be exercised. If it may be exercised at all, it must "be exercised at the will of those in whose hands it is "placed."

It is, then, not a question of the extent to which the power may be carried, but whether it exists at all. If it may be exerted at all, it may be to an unlimited extent; for, admit the possession of the power by the legislature, and it must also be admitted that it is without limit, and without control, save by the discretion of that body; and that it may be used to deprive a party of his property, without due process of law, and to take private property for public use without just compensation. Hence, we deny the existence of the power in the legislature to interfere with the rates of fare at all.

So, too, franchises are property, and the company can no more be deprived of them without due process of law, that is, without a direct judicial proceeding for that purpose, than it can be deprived of its tangible, corporeal property. Now, this act of the Iowa legislature does, in

direct terms, take from the company, without due process of law, one of its most valuable franchises, and abridge its privileges and immunities; which is the very thing the 14th amendment declares no State shall do.

If, in this way, the company may be deprived of one of its franchises, it may, by the same authority, and in the same way, be deprived of them all; and if the 14th amendment gives no protection; if this court can give no relief, the company is without remedy, and helpless.

But, it may be asked whether the State is without remedy for extortionate charges by railroad companies? Certainly not. But the remedy is not to be sought for in the tinkering of legislative bodies with the rates of compensation. A less suitable depository of the power to fix and regulate railroad fares could hardly be found than the General Assembly, and to entrust it to that body would be of like pernicious influence upon the legislation of the State and the business of the company. Making a tariff of rates for transportation, and fixing the prices for services rendered, is, in no sense, a legislative function, and is what the General Assembly cannot do by virtue of its legislative powers under the constitution. By authority of the constitution, the General Assembly can perform only legislative acts, and this is not one. If the power can be exercised at all, it must be by virtue of a concession of the right by the charter, or by general laws which govern the charter. It cannot be claimed as an inherent legislative power, nor as a right sanctioned and conferred by the constitution. I know of no instance of the exercise of such a power by a legislative body, except where it is reserved by the charter contract, or by pre-existing laws which became a part of the contract.

A General Assembly is, of all bodies, the least suited to a wise, impartial and discreet performance of such a duty. Few, if any, members of an entire legislature possess the

requisite qualifications and information to fit them for such a trust. It is necessarily a difficult and complicated task, and those who undertake it should be well informed of the original cost of construction and equipment of the road; of the cost of keeping it in repair and operation; of the annual percentage of deterioration by use; of the average amount of loss by flood and fire; of the liability to damages from accidents, to life, limb and property, &c.; and should have such a knowledge of the laws of trade as would fit them to make that difficult adjustment which should combine the very largest amount of business with the lowest compensating rates of carriage. These, and many other considerations, are to be taken into account in the arrangement of a fair and just tariff, and the average legislator is very poorly qualified for the calm, impartial and patient investigation which the duty demands.

Again, it is the part of wisdom, and is very desirable, to keep corporations, and especially large and powerful ones, as far separated from political influences and intrigues as may be practicable. On the one hand, where legislative control over the affairs of corporations exists, the cupidity of unscrupulous members will lead to a sacrifice of public welfare to private interest; while on the other hand, it will be an invitation to corporations to enter the halls of legislation, and by personal, political, and pecuniary appliances, corrupt members to a betrayal of their trusts and obligations to the public, and to undue subserviency to the money power of the corporations. Legislators will black-mail corporations, and corporations will bribe legislators, to the reproach of the State, and the great detriment of the public interests.

The rates of transportation would be in a state of continual fluctuation, rising and falling as the one party or the other prevailed, while business men could have no certain data to guide them, and business interests generally would be damaged and deranged.

To give to the legislature this pernicious control over the tariffs of railroads, with the view of protecting community against exorbitant rates, would be adopting a remedy worse than the disease.

It is admitted that the legislature might have reserved control over the tariffs, but, for good and sufficient reasons, they wisely forbore to do so, and left it with the board of directors, as the tribunal, of all others, best qualified to act intelligently and impartially, and to which the duty could be most properly entrusted.

But, in doing so, they did not leave the State without remedy for abuses.

The prosperity of the company is identified with the prosperity of the country. They cannot be separated; and it is the interest of the company to promote the prosperity of the people, with the view of promoting its own.

It is its interest so to manage the affairs of the road as to secure popular favor and patronage, and to do this, to put its charges down to the lowest rates at which reasonable profits can be realized; a large business, at reasonably low rates, always paying better than a small business at unreasonably high rates.

It is due to the legislature to suppose that all these things were considered; and, as the fixing of the rates of transportation had to be entrusted to some agency, they in their wisdom, chose the board of directors as the most appropriate and best qualified.

The State was willing to rely upon the natural laws of trade, which govern and regulate all business and employments, and upon competition in business, to secure reasonable rates of transportation, knowing that if, in disregard of these, the company should abuse its powers, its charter could be annulled and taken from it, by a direct proceeding for that purpose.

Common carriers by railroad are of comparatively re-

cent origin. Their business differs, in many respects, from that of the old class of carriers, and has to be conducted upon a different system, and under different regulations: and these differences demand corresponding modifications of the rules of law applicable to them.

There are continual fluctuations in the commerce of the country; in the state of trade; and in the exigencies of business, which make this necessary. For instance, what would be reasonable rates to day, might not be such three months hence. A change in the state of trade might make a change in the rates of transportation a necessity. So, too, it might be eminently wise, just and proper, on the same day, to carry at different rates, in opposite directions over the same road. If, as frequently happens, shipments were flowing rapidly in one direction, and slow to move in the other, so that large numbers of empty cars were being returned over the road, it would promote the interests of the company, and would do no injustice to the public, to secure return freights by a reduction of rates.

To meet, and deal with these exigencies, and others which are constantly occurring, the control of the tariffs should be in hands that could act promptly and intelligently. A legislative tariff would be altogether unsuited, and inadequate to the occasion. We are to suppose that these, among other reasons, had their influence in shaping the laws and charter which entrusted the power to the company's board of directors.

Again, if it be conceded that the companies must carry at reasonable rates, it is evident that, in the interests, both of these roads and the public, there should be some standard of reasonableness.

What is that standard to be ?

The law and the charter have answered that question, by investing the board of directors with authority to prescribe the rates. Having lawful authority to make a tar-

iff, that tariff, when made, is to be presumed to be reasonable, until the contrary is made to appear; for whatever is lawful must, necessarily, be presumed to be reasonable.

But, it may be asked, what remedy has the public if, after all, the rates fixed by the company should, in fact, be extortionate? I answer, a plain, simple, efficient, and entirely adequate one, far superior to that afforded by legislative control.

The refusal of the companies to carry, except at extortionate rates, would be an abuse of their privileges and franchises, which would amount to a forfeiture, and direct proceedings to enforce the forfeiture could, at once be instituted.

All franchises are granted on condition that they shall be duly executed according to the grant; and if, under its charter, it was the duty of the Burlington and Missouri River Railroad Company to carry at reasonable rates, then the refusal of the complainant company to do so, would be such an abuse of the franchise as would amount to a forfeiture, and expose the complainant to a loss of all its charter privileges in and over the road.

This is the control which the State intended to, and did retain over the rates of transportation of railroad companies. It is the best and most valuable power that could have been reserved; and a far better protection to the public than any amount of legislative intermeddling could be. A proceeding to enforce a forfeiture of its charter, held *in terrorem* over a railroad corporation, will not fail to secure the strict observance of its charter obligations, and the faithful performance of all its charter duties. It is not only the most efficient, but is, in fact, the only appropriate power of supervision over the rates of transportation which the State could retain.

It was not the intention of the charter of the company, that an inquiry into the *reasonableness in fact*, of its tariff of rates should be made in any other than a direct pro-

ceeding against the corporation for a forfeiture of its charter.

The company, it is true, is liable to be sued, as any other common carrier, by any shipper, to recover back any excess which he may claim to have paid over and above a lawful rate; but, in all such suits, it should be a full answer and defence for the company to plead and prove that the rate paid and complained of, was the rate which had been previously fixed by the company under the authority of its charter, and which was uniform in its application to all persons.

This being done, the presumption that the charge was reasonable, should at once arise. It should be presumed to be reasonable, because lawful; and if it was intended to go further, and show that it was, in fact, unreasonable and extortionate, that should be permitted only in a direct proceeding against the corporation for forfeiture.

Any other rule will be fraught with danger and disaster to the roads and to the business of the country.

If the question of reasonableness, in fact, of the rates is to be tried in every suit which may be brought by individuals against the company, there will be as many different rules or standards of reasonableness as courts and juries before whom the cases are tried.

It is not probable that any two juries would agree in their conclusions; and the very same rate that would be held to be reasonable by one jury, would be pronounced extortionate by another. Under such a system, railroad companies could not transact business; and it could never have been the intention to place them in such an unhappy state of uncertainty, doubt and danger, and to expose the business of the country to such continual harassment, vexation and injury, as would inevitably result from such a state of things.

These evils and many others, will be avoided by according to the company, what I cannot doubt it is justly en-

titled to under its charter, the right to prescribe the tariff of rates for transportation over its road, and by holding it responsible for an honest and just use of the power.

When the corporation shall be charged with an abuse of its franchises, it will be easy to proceed against it to enforce a forfeiture. But it transcends legislative power to declare it.

It cannot be enforced collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose. In such a proceeding, the corporation can make its answer.

A competent tribunal can hear and consider all the questions involved, in all their ramifications, and dispose of the case, without passion or prejudice, by a judgment which shall bind all, and furnish a rule for the government and guidance of all; whereas, by opening the question of reasonableness in fact, to inquiry, at the instance of every private suitor, the company will be continually harassed, and the carrying trade damaged, by a multiplicity of suits instigated by demagogues and pettifoggers, which, when tried, would settle nothing but the right to the paltry sum which might be involved.

The charter must have a construction reasonable, and consistent with the public objects to be promoted under it; and not such an one as tends to impair, defeat, or subvert these objects.

In the circumstances of their origin, and in their powers, uses and duties, railroad corporations are clearly distinguishable from other merely private corporations; and unless their characteristics are kept in view, when we come to determine the rights, powers and duties of such corporations, and the authority, express, implied or reserved, of the legislature and courts in respect to them, there will be great hazard of confounding dissimilar distinctions, and committing grave errors.

R. R. Comm'rs v. *P. & O. C. R. R. Co.*, 6Ɛ Me., 276.

VI.

The bill alleges that the Iowa law is in conflict with that provision of the constitution of the United States which gives to Congress the power to regulate commerce among the several States.

On this proposition I wish to remark only, that, if prescribing rates for the transportation of persons and property, passing from State to State, be a regulation of inter-State commerce, and a subject upon which Congress may properly legislate, then the right of the appellant to fix its own rates, by contract, for such transportation, is clear and unquestionable, under the laws of Congress; and the act of the Iowa legislature cannot be maintained.

It will be observed that the act is general. It embraces all persons and all property, wherever taken up and wherever discharged. It makes no exceptions, but covers everything which is capable of being carried upon a railroad, making no distinction between domestic and inter-State commerce. Its language is, "that all railroad cor-" porations organized or doing business in this State, their " trustees, receivers or lessees, under the laws or authority " thereof, shall be limited in their maximum charges to the " rates of compensation for the transportation of passen-" gers and freight, which are herein prescribed.

" Any officer, agent or employee of any railroad com-" pany, person or corporation, operating a line of railroad " within this State, who shall violate, or be a party to the " violation of any of the provisions of this act, or instru-" mental therein, shall be guilty of a misdemeanor, and " shall, on conviction thereof, be punished, &c."

Thus, the law takes charge of, and prescribes the rates for, and regulates the whole subject of transportation, wholly irrespective of the place of shipment and delivery. The prohibition upon the carrier to make contracts for the transportation of persons and property coming from another

State, or taken up to be carried into another State, is as positive and absolute as in respect to transportation wholly within the State ; and the company is as much exposed to the penalties of the law in the one case as the other.

Was it competent for the General Assembly of Iowa to do this ; and can the law have any force or efficacy ? It presents a case of direct conflict between a law of a State and a law of Congress, in which one or the other must give way.

In 14 Stat. at Large, 66, will be found an act of Congress, passed June 15th, 1866, containing the following provision :

" Every railroad company in the United States, whose " road is operated by steam, its successors and assigns, be " and is hereby authorized to carry upon and over its road, " boats, bridges and ferries, all passengers, troops, govern- " ment supplies, mails, freight and property, on their way " from any State to another State, and to receive compen- " sation therefor, and to connect with roads of other " States, so as to form continuous lines for the transporta- " tion of the same to the place of destination."

Here, the express and direct authority is given the appellant to transport from State to State, and to receive compensation therefor, which, *ex necessitate rei*, includes the right and power to fix such rates of transportation ; while the act of the General Assembly of Iowa as directly and expressly takes away the right, and makes it a criminal offense in appellant to do any such thing. The constitution, and laws of the United States made in pursuance thereof, are the supreme law of the land, and it is declared that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

If, then, this act of Congress was passed in pursuance of the constitution of the United States; if its enactment was within the sphere of the constitutional authority of

Congress, it is, upon this subject, the supreme law of the land; and the act of the Iowa legislature, being upon the same subject, and in direct conflict with it, is an absolute nullity, and of no force or effect whatever.

It is true, the Attorney General of Iowa has, in his answer, disclaimed all purpose and intention of prosecuting appellant on account of charges for persons or property going to, or coming from, another State; but this disclaimer can give no force or efficacy to a law which would have none without it.

If the law was void before such disclaimer, it is equally so now.

Nor should the fact that the Attorney General does not intend to prosecute, on account of inter-State commerce, have any influence on the decision of the court.

His disclaimer is undoubtedly made in good faith, and will be kept in good faith; but the company is exposed to daily prosecutions by others, over whom the Attorney General has no control.

By the terms of the law, any person who has transportation of either person or property upon the road, may sue the company for the penalties. Such suits are now being brought and prosecuted from time to time, and the Attorney General has no power to prevent it.

They are quite beyond his control; and the appellant can find protection from such annoyance and wrong only in the action of this court.

VII.

But it is insisted that the law is a mere police regulation, and it is defended on that ground; the appellee contending that under the general police power of the State, the right is inherent in the legislature to regulate, by statute, the rates of fare for the transportation of freight and pas-

sengers, notwithstanding there may be no reservation of such power in the charter of the company.

If the premises were sound, the conclusion would, perhaps, be logical.

If the fixing of the rates of fare, or, in other words, making contracts, be but an exercise of the police power, but a police regulation, then, it may be that the right of the legislature to enact the law complained of cannot be questioned.

But the premises are not sound. Such a law is in no sense a police regulation.

It is a perversion of legal language to call it so; a confounding of legal rights, duties and powers, which have no connection or affinity with each other.

This is claiming for the police power a scope and range which has never heretofore been accorded to it, either in this country or Great Britain.

The police power is the power by which the good order of society is secured; the general behavior of the people regulated; good neighborhood, good manners and decency preserved; health protected; nuisances prevented; and crimes and misdemeanors detected and punished.

But it is a usurpation of power, under such a pretext, to deprive an individual, or a corporation, of the right to contract, and to compel the acceptance, as compensation for services rendered, of a sum arbitrarily fixed by a legislature.

The general nature of the police power is well indicated by Mr. Justice McLean, in the License Cases, 5 How., 589. It is the power of self-preservation, and exists necessarily in every organized community. It extends to every thing which may contaminate the morals, or endanger the safety of society.

It is to be wielded for the preservation of the rights and privileges of the citizen, but can never be perverted to their destruction.

Mr. BLACKSTONE says: "By the public police and "economy, I mean the due regulation and domestic order "of the kingdom, whereby the individuals of the State, "like members of a well governed family, are bound to "conform their general behavior to the rules of propriety, "good neighborhood, and good manners; and to be decent, "industrious and inoffensive in their respective stations."

4 Bl. Comm., 162.

Mr. BOUVIER says: "The word police has three sig-"nifications, namely:

"1. The first relates to the measures which are adopted "to keep order, the laws and ordinances on cleanliness, "health, the markets, &c.

"2. The second has for its object to procure to the "authorities the means of detecting even the smallest "attempts to commit crime, in order that the guilty may "be arrested, before their plans are carried into execution, "and delivered over to the justice of the country.

"3. The third comprehends the laws, ordinances and "other measures which require the citizens to exercise "their rights in a particular form." (2 Bouv. Law Dict. 348.)

The word *police*, does not include the power, arbitrarily, to deprive a citizen of any right, or to deny him its exercise.

He may, for the peace and good order of society, be required to exercise it in a particular *form or manner*, but it cannot be taken from him. It may be *regulated*, but not destroyed. The railroad legislation of Iowa well illustrates the distinction between police regulations and laws which impair rights. The legislature passed a law, hereinbefore referred to and commented upon, by which railroad companies were required in the month of September, annually, to fix rates of fare for passengers and freight, and on the first of October following, to put up at all stations and depots on their roads, printed copies of such fare

and freight, and to cause copies to remain posted during the year, &c.

This was a legitimate exercise of the police power. The validity of this law was called in question, but this court held that it was a mere police regulation, which did not attempt to control the *rates to be charged for freight and fare*, but left the company in the exercise of all its faculties, and was therefore, a proper exercise of legislative power, and constitutional.

Railroad Company v. *Fuller*, 17 Wall., 567.

The decision was placed upon the express ground that the law was a mere police regulation, which made no discrimination between local and inter-state freights, and *no attempt to control the rates that might be charged;* but only required of the companies that they should exercise one of their faculties in a particular manner. In this, the court says, " there is nothing unreasonable or onerous. " The public welfare is promoted without wrong or injury " to the company."

It is not said in explicit terms, but is as strongly implied as it can be, that if the law had gone further, and prescribed the rates to be charged, it would have transcended the police powers of the legislature; would have denied to the companies the exercise of one of their faculties; and would have been unconstitutional and void.

Where is the limit of the police power to be fixed, if it is to have the extent claimed for it by the appellee ? Why may not the legislature, by the same authority, fix the prices to be charged by all other corporations, as well as railroad companies ? What is to hinder ? Why may they not prescribe the prices at which manufacturing companies shall sell their woolen and cotton cloths; their carpets; their boots and shoes; their hardware and china; their lucifer matches; in fine, everything that enters into the economy of social and domestic life ?

If, as claimed, the police power extends to the regulation

of the prices of the commodities of railroad companies, then it equally extends to the regulation of the prices of the commodities of all other corporations and all persons; for there is not one police power for railroad companies, and a different and distinct one for the rest of community.

It applies to all alike, and whatever may be done, by virtue of it, in respect to one, may be done in respect to all.

Others can claim no exemption from a police power to which railroad corporations and railroad employees are subject.

In *State* v. *Noyes*, 47 Me., 189, the effort was made to uphold a law which interfered with the chartered rights of a railroad company, upon the ground that the law was but a police regulation.

It was contended there, as here, that the State could not part with its police powers, and that the law was obligatory upon the company, notwithstanding it was in conflict with a right which the company might lawfully claim and exercise under its charter.

In delivering its opinion in the case, the court asked a question which may appropriately be asked here: "If "railroads can be made subject to police regulations, from "which others are exempt, how far can this duty be ex- "tended? If the power exist to impose it in the slightest "degree, we know of no line of limitation." (p. 214.)

And further on in the opinion, the court said: "If "chartered rights may be impaired, and new duties im- "posed upon a corporation, * * * in contravention of "stipulations in the charter, under the principle that it is "merely the exercise of the police power to promote pub- "lic convenience, it is a new and easy mode by which this "constitutional security of private property and privileges "may be broken down." (p. 216.)

In the same case, the court said: "No reason is per- "ceived for imposing upon private corporations, established

" from public necessity and convenience, more onerous " duties in police regulations, than those to which indi- " viduals in the same condition are made subject." (213–14.)

It will hardly be contended that, to deprive an individual common carrier of the right to make contracts, and to prescribe the rates at which he should render services, would be a legitimate exercise of the police power.

This subject is discussed at some length, and with force and clearness, in Cooley's Constitutional Limitations, 574, *et seq.*

In reference to its bearing upon the clause of the constitution of the United States, which forbids the States passing any laws violating the obligation of contracts, he says: " The limit to the exercise of the police power, in " these cases, must be this: The regulations must have " reference to the comfort, safety or welfare of society; " they must not be in conflict with any of the provisions of " the charter; and they must not, under pretence of regu- " lation, take from the corporation any of the essential " rights and privileges which the charter confers. In " short, they must be police regulations in fact, and not " amendments of the charter in curtailment of the cor- " porate franchise."

In *Benson* v. *The Mayor, &c.*, 10 Barb., 245, the doctrine is stated thus:

" Franchises of this description are partly of a public " and partly of a private nature. So far as the accommo- " dation of passengers is concerned, they are *publici juris*; " so far as they require capital and produce revenue, they " are *privati juris*.

" Certain duties and burdens are imposed upon the " grantees, who are compensated therefor by the privilege " of levying ferriage, and the security from spoliation aris- " ing from the irrevocable nature of the grant. The

" State may legislate touching them, so far as they are " *publici juris.*

" Thus, laws may be passed to punish neglect or mis- " conduct in conducting the ferries, to secure the safety of " passengers from danger and imposition, &c.

" But the State cannot take away the ferries themselves, " nor deprive the city of their legitimate rents and profits."

A recent case in Illinois is somewhat more explicit in defining what may and may not be done under the police power, in respect to railroad corporations.

The court said : " There can be no question that rail- " way corporations are subject to police regulations as " well as private citizens. The General Assembly, when " the public exigencies require it, has power to regulate " corporations in their franchises, *so as to provide for the* " *public safety.* The exercise of this right in no manner " interferes with or impairs the powers conferred by their " acts of incorporation. Under this power, it has been " held that the legislature may require railroad corpora- " tions, notwithstanding no such right has been reserved " in the charters, *to fence their tracks; to put in cattle* " *guards; to place upon their engines a bell*, and to do many " other things *for the protection of life and property.* " This power is inherent in the State, and it cannot part " irrevocably with its control over that which is for the " *health, safety and welfare of society.* But such regula- " tions must be what they purport to be, police regula- " tions, and must be reasonable when applied to corpora- " tions or individuals. * * * Like other powers of gov- " ernment, there are constitutional limitations to its exer- " cise. It is not within the power of the General Assembly, " under the pretense of exercising the police power of the " State, to enact laws not necessary to the *preservation*

" *of the health and safety* of the community, that will be " oppressive and burdensome upon the citizen."

T., W. & W. R. W. Co. v. *Jacksonville*, 67 Ills., 40.

See also: *P., W. & B. R. R. Co.* v. *Bower*, Am. Law Reg., March No., 1874, p. 174.

I will not multiply authorities, nor prolong the discussion upon this point. Enough has been said to point out the distinction between laws which regulate public duties, and those which invade private rights; between laws which have reference to the comfort, safety and welfare of society, and such as directly assail contract obligations, and under the pretext of police regulations, import amendments into charters which materially change the relations of the corporations to the State.

VIII.

The act is in conflict with, and a violation of, Section IV, Art. I, of the Constitution of Iowa, which provides that " all laws of a general nature shall have a uniform opera- " tion; the General Assembly shall not grant to any citi- " zen, or class of citizens, privileges or immunities, which, " upon the same terms, shall not equally belong to all citi- " zens."

Now, this act does precisely what the above provision of the Constitution forbids. It grants privileges and immunities to other railroad companies which are denied to the appellant. It compels the appellant to transport freight and passengers upon its road for less compensation than other railroad companies are allowed to charge and receive for transporting like amounts of freight and passengers for equal distances.

The labor, cost and expense of transportation over ap-

pellant's road are full as much per mile as over the other railroads of the State; yet appellant is required to perform the service for less than other companies are permitted to receive for precisely the same service.

The appellant is subjected to prosecution and heavy penalties for doing the same thing which other railroad companies of the State have the privilege and immunity of doing at pleasure, without breach of the law; without liability to prosecution; and without exposure to the pains, penalties and forfeitures which are visited upon appellant for the same act.

It is no answer to say that the appellant would, probably, carry for less than some of the other roads in the State, if there were no law upon the subject. It is not a question of what might, or might not, be voluntarily done, but what the legislature may, by pains and penalties, compel some to do, while the privilege and immunity of exemption is granted to others.

This is exactly what the constitution says the General Assembly shall not do.

There is no reason in the nature of things, or the necessities of society, why parties may not render services at less than compensating rates, or even gratuitously, if they choose to do so, while there are very strong reasons, founded in the very nature and principles of social organization, why the legislature shall have no power of control over them, in that regard, or right of discrimination between the different members of community.

Hence, the constitution has inhibited discriminating laws, and forbidden the legislature to grant a dispensation to one to do, what another cannot do, without a breach of the law and liability to prosecution.

The foregoing has reference to discrimination between corporations of the same class by allowing to some railroad companies privileges and immunities which are de-

nied to others; but this is not the only feature or provision of the law which is violative of the constitution.

The legislature has gone still further, and granted privileges and immunities to all persons who will prosecute railroad companies under the act, which other suitors are not permitted to enjoy. Any person who has been charged in excess of the rates prescribed by the act, may sue the company, and recover five times the amount paid in excess, or five times the amount of damages caused thereby, together with an attorney's fee to be included in the judgment. If the company appeals from the judgment, still another fee is to be assessed against it, and included in the judgment in the appellate court. In addition to this, and for the same excessive charge, the company forfeits five hundred dollars to the school fund, to be recovered in an action in the name of the State. The eighth section then provides, that when any prosecution or action for the violation of any of the provisions of the act shall be commenced, it shall be the duty of the governor, under certain conditions, to employ counsel to conduct or assist in conducting the same, and to pay for his services out of the public treasury; and an appropriation is made for that purpose.

Here, then, is an act of the General Assembly which grants to a certain class of citizens the privilege or immunity of having counsel to prosecute their private suits, for their private benefit, employed and paid by the State—a privilege which does not "equally belong to all citizens," as all others have to pay for the luxury of litigation out of their own pockets.

It may be said that the privilege would be granted to all upon the "same terms"—that is, upon condition that they sue railroad corporations. But this is a mere evasion of the constitution. Under such a construction, it would be entirely competent for the legislatare to enact that all the expenses of litigation, accruing in suits upon promissory

notes, should be paid out of the public treasury, while in suits upon other causes of action the parties should defray their own expenses.

The constitution intended to keep all citizens upon a platform of perfect equality before the law; and to give all classes of litigants precisely the same privileges and immunities. It was never intended to leave it in the power of the General Assembly to pay a premium for prosecutors, who might be willing, at the public expense, to indulge in the pastime of harassing and hunting down railroad officers and employees.

The appellant is one of the largest tax payers in the State of Iowa; and the law is conspicuously unjust and unconstitutional, in compelling the stockholders, (for, by whom, ever paid in the first instance, the taxes ultimately come off of them,) in addition to all other assessments upon them, to pay a tax to be expended in the prosecution of suits for the destruction of their franchises, and the ruin of their property.

If the law shall be sustained, the consequences cannot but be very disastrous to the company, and to all, both in and out of the State, who have invested their money in the enterprise of the road. A reward is offered for prosecutors, and the company and its interests will become the prey of every hungry pettifogger in the State; and there are, no doubt, many who will be willing to foment suits for the sake of the fees to be paid out of the public treasury, paltry though they may be.

It is a very extraordinary provision, and one which it does not seem possible to reconcile to that exact and equal justice which it was the purpose and intention of the constitution to secure.

Whatever the decision of this court may be, upon the interesting questions presented in these suits, it is important alike to the welfare of the roads, and the country at large, that a decision by this tribunal of last and final resort

shall be had, and that this harassing and injurious litigation shall be terminated.

If railroad companies are no longer to have that reasonable and just control of their own property, which is accorded to all others, it is due to them that they shall know it, and it is due to those who have invested their means in the road, that the relations in which it stands to the legislature of the State, shall be definitively declared.

Until such time, there must necessarily be confusion and uncertainty in the management of the company's affairs, and in the commercial transactions of the country. The public authorities of Iowa, the Governor and Attorney General, have afforded to the appellant every possible facility for bringing the case before this court. Their bearing towards the company has been eminently courteous and just. On no occasion, have they evinced a disposition to oppress the company, or embarrass its business by needless and unreasonable prosecutions. They, I am sure, in common with the appellant, earnestly desire that every question in dispute shall be finally and conclusively settled by this court, and that an end shall be put to all further controversy between the State and the Company.

O. H. BROWNING,

For Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1876.

No. 332.

Appeal from the Circuit Court of the United States for the District of Iowa.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

APPELLANT,

—*vs.*—

M. E. CUTTS, ATTORNEY GENERAL OF IOWA, AND OTHERS,

APPELLEES.

PETITION FOR REHEARING.

O. H. BROWNING,

FOR APPELLANT.

CHICAGO:

Beach, Barnard & Co., Legal Printers, 104 Randolph Street.

1877.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1876.

No. 552.

Appeal from the Circuit Court of the United States for the District of Iowa.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

APPELLANT,

—*vs.*—

M. E. CUTTS, ATTORNEY GENERAL OF IOWA, AND OTHERS,

APPELLEES.

PETITION FOR REHEARING.

O. H. BROWNING,

FOR APPELLANT.

CHICAGO:

Beach, Barnard & Co., Legal Printers, 104 Randolph Street.

1877.

Petition.

I.

A rehearing of this case is respectfully asked.

On the argument the appellant endeavored to establish the following propositions:

1. That the charter under which the road was constructed, and is now operated, was a contract between the railroad company of the one part, and the State of Iowa of the other part, and that every essential franchise conferred by the charter was protected by the Constitution of the United States from impairment by any act of the State of Iowa.

2. That the right to operate the road, and to contract for and receive compensation for the transportation of persons and property upon it, were among the essential franchises conferred upon the company by its charter.

3. That the essential franchise of contracting for and receiving compensation for transportation, could not be taken away, or limited, or impaired by the Legislature of Iowa, unless the power to do so was expressly reserved, either in the charter, or by pre-existing constitutional or statutory provision.

4. That the Legislature could not prescribe the rates of fares and freights by virtue of its police powers over the road, and that the power to do so not having been reserved in the charter, nor by any constitutional or statutory provision existing when the charter was granted, the act of the Iowa Legislature prescribing maximum rates

for transportation, was therefore a violation of the contract with the company, and unconstitutional and void.

The opinion of the Court concedes that the charter of the company is a contract protected by the Federal Constitution from impairment by State authority.

The language of the Court is: "It is now too late to "contend that the charter of a corporation is not a contract "within the meaning of that clause of the Constitution of "the United States which prohibits a State from passing "any law impairing the obligation of a contract. What- "ever is granted is secured subject only to the limitations "and reservations in the charter, or in the laws or consti- "tutions which govern it."

The opinion, also, impliedly concedes that the right to fix the rates of fares and freights, was one of the franchises granted to the company by its charter. The company had exercised that right for twenty years without objection or interference by the State, and it is not claimed in the opinion that it therein exceeded its powers or franchises.

It is also substantially admitted by the opinion that, if the power to fix the rates of compensation had been expressly granted to the company, and made a part of the charter, it would "have presented a contract against future "legislative interference," from which it necessarily follows that if the right was granted by implication, it equally presents "a contract against future legislative in- "terference," for an implied grant is as much a part of the contract, and as effectually protected by the constitution, as an express one.

If, then, I properly apprehend the opinion, it sanctions the following propositions:

1. That the charter of the company is a contract within the meaning of that clause of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of a contract.

2. That if the right to fix the rates of fare and freight had been expressly granted by the charter of the company, it would "have presented a contract against future "legislative interference."

3. That the right to demand and receive compensation, and to fix the rates thereof by contract with customers, was essential to enable the company to conduct the business for which it was created, and was necessarily implied from the grants which were expressly made.

These propositions are all, undoubtedly, sound and true. They need no authority to sustain them. Nevertheless, in support of the last one, I refer the Court to *The People* v. *Marshall*, 1 Gilm., 684; *O. & M. R. R. Co.* v. *McClelland*, 25 Ill., 141; *Boyle* v. *Phila. & Reading R. R. Co.*, 54 Penna., 316; *Penna. R. R. Co.* v. *Sly*, 65 Penna., 211.

The Judge who delivered the opinion in *Boyle* v. *P. & R. R. R. Co.* said: "No provision was made respecting "rates and charges for their own service as carriers; but "the very purpose of their incorporation was that they "might carry. How can they carry without compensa-"tion?

"Authorized to engage in a business, it is necessarily "incident to their authority that they have the rights "which ordinarily belong to such business. * * * "The right to charge is implied in the nature of the busi-"ness authorized, and I cannot conceive of conducting "the business of transportation without the imposition of "rates and charges."

Now, an implied power, right, or condition in a contract, is as I have said, as much a part of the contract, and as inviolable, and as far beyond the reach of legislative interference as an express one. Whatever the contract was, therefore, whether by expression or necessary implication,

it was sacred; and whenever its terms and conditions can be ascertained, whether express or implied, they are equally under the shadow of the constitution, and equally protected from impairment by legislative interference.

In *Boston & Lowell R. R. Co.* v. *Salem & Lowell R. R. Co.*, 2 Gray, 29, C. J. SHAW, treating of a railroad charter, says: "The act, like every other act and charter "of the same kind, is a contract between the government, "on the one part, and the undertakers accepting the act "of incorporation, on the other; and, therefore, what they "both intended by the terms used, if we can ascertain it, "forms the true construction of such contract."

It is said in the opinion delivered in the case now being considered, that, "It is a matter of no importance that "the power of regulation now under consideration was "not exercised for more than twenty years after this "company was organized. A power of government "which actually exists is not lost by non-user."

Whether the power of regulating the rates of freights and fares existed in the government of Iowa, depended upon the terms of the contract between the State of Iowa and the company; and it was supposed by the counsel who argued the case to be of great importance to show what the contract really was, by showing the contemporaneous construction put upon it by the parties themselves, conceding the right to fix the rates of compensation to the company; and to be of equal importance in showing that the power did not exist in the government, by showing twenty years, not only of acquiescence, but of active co-operation by the State, in executing the contract under the construction which conceded the power to be in the company, and not in the State.

It was an entire and indivisible power which could not co-exist in the company and the State. It could not be exercised by both at one and the same time. Wherever

it abided, it was exclusive; whichever had it, had the whole of it; and there was no residuum for the other.

Gibbons v. *Ogden*, 9 Wheat.
City of N. Y. v. *Miln*, 11 Pet., 157–8.

At the adoption of the charter, both parties *intended* that the power should be with the company, and what the *parties intended*, in the language of Chief Justice SHAW, "forms the true construction of the contract." For more than twenty years after the contract was made, the State not only conceded the power to be in the company, but repeatedly passed laws to compel the company to exercise it.

There is, then, no doubt, and no controversy as to what the contract was when made, and what it was, as interpreted and acted upon by both parties, continuously, for more than twenty years.

I do not understand the opinion of the Court to be in conflict with this contention. I understand it to concede the construction of the contract here insisted upon; and that the company, by virtue of the grants in the charter, for more than twenty years, possessed and lawfully exercised control over the rates of transportation. But I also understand the opinion, while conceding this construction, to maintain that the company possessed and enjoyed this right of control only at the will of the other party to the contract; and that since the passage of the act of March 23, 1874, "to establish reasonable maximum rates of "charges for the transportation of freight and passengers "on the different railroads of Iowa," the contract between the State and the company in respect to fares and freights is no longer what it was for the first twenty years of its existence; but that the Legislature of Iowa has changed and modified it by taking away from the company its control over freights and fares; and that it has accomplished this without impairing the obligation of the contract between the State and the company.

I am not sure that I fairly and properly apprehend the ground upon which the Court founds the power of the Legislature to deprive the company of the right to control and regulate the rates of compensation. But, if I understand it aright, it derives it from two sources, upon both of which, with the indulgence of the Court, I respectfully submit a few suggestions.

I.

The first is, that the company, being a common carrier, took its charter, impliedly subject to what is said to be a common law rule applicable to all common carriers, that "it must carry when called upon to do so, and can charge only a reasonable sum for the carriage," and that the Legislature may, at any time, "step in and prescribe a maximum of charge," to which the company is obliged to submit and conform.

Conceding, for the argument, that this is the common law rule, and that it is still in force in this country, it becomes then material to enquire whether the company did take its charter subject thereto, and whether it can have any application to this case. There is surely nothing so sacred about the common law rule as to put it beyond the power of legislative modification or repeal. And it may be repealed either expressly or by implication. If a State grants a charter containing a provision inconsistent and incompatible with the rule, that is, *ipso facto*, a repeal of the rule. If the Legislature charters a company to become a common carrier, and by the charter expressly grants to the company the right to fix its own rates of freight and fares, it would, I think, be absurd to say that this grant was impliedly subordinate to the common law rule that the rates should be reasonable, and that the Legislature should have the sole power to determine and prescribe what

should be considered reasonable. The grant and the rule would be directly in conflict. They could not both stand. One or the other would have to give way. Can there be any doubt as to which? I understand the opinion to concede that, in such case, the charter would present a " con- " tract against future legislative interference."

But an implied condition in a contract, or grant in a charter, is as much a part thereof, and is to have precisely the same force and effect as if it were expressed in terms; and is as effectually protected by the constitution. Now, it is admitted on all hands, that the right to fix the rates of compensation was one of the implied grants to this company, and that the company lawfully enjoyed the right for more than twenty years.

This implied grant, when admitted to exist, is to be construed precisely as if it were express, and to have the same force and effect. It is incompatible with the common law rule relied upon, and must prevail against it, unless the Court shall hold that it is not competent for a State Legislature to repeal, alter or modify the common law.

The rights, powers and duties of a corporate common carrier are to be sought for in and controlled by the charter of its existence. But all common carriers are not created by charter or contract. Any person, of his own volition, without charter from, or contract with the State, and without asking or obtaining permission from anybody whatever, may become a common carrier.

In such case, his relations and duties to the State, as well as to the public, are defined and regulated by law; and it may be, that under the general rules and principles of law applicable thereto, the Legislature might interfere in the matter of compensation. There is no contract by which the right to do so, if it exist, is restrained.

But if the same person, instead of voluntarily assuming the business, has a chartergranted him by the State, authorizing

him to prosecute the business of a common carrier, on the terms and conditions specified in the charter, and he, in pursuance thereof, expends large sums of money in opening highways; in providing new and safe vehicles and improved machinery for rapid transit; and enlarged facilities for the accommodation of the public; the relations between him and the State; and his rights and powers, and the rights and powers of the State, as between it and the carrier, are, thereafter, to be determined by the terms of the charter; and if in the charter there is no reservation of power to the State to regulate or interfere with the rates of transportation, it cannot do so without impairing the obligation of the contract. The common law rule does not apply; it is superceded by the charter. The doctrine upon this subject, announced by the various courts of this country, by which the question has been considered, are consistent and uniform, that where a contract has been made by a State, the Legislature of the State cannot afterwards annul, alter, or modify such contract, or any provision thereof, unless the power to do so has been expressly reserved in the contract, or by some pre-existing constitutional or statutory provision, which beomes a part of the contract.

In *Wales* v. *Stetson*, 2 Mass., 146, Chief Justice PARSONS said, "Rights legally vested in any corporation cannot be "controlled, or destroyed, by any subsequent statute, *un-* "*less a power for that purpose be reserved to the legislature* "*in the act of incorporation.*"

A half century later, Chief Justice SHAW reiterated the same doctrine. In considering the grants in a railroad charter, he said, "In making such grants and stipulations, "no doubt great caution and foresight are requisite on the "part of the legislature, a just estimate of the public benefit "to be procured, and the cost at which it is to be obtained; "and as great changes in the state of things may take

" place in the progress of time, a great increase of travel, " for instance, on a given line, which changes cannot be " specifically foreseen, it is the part of wisdom to provide " for this, either by limitation of time, or *reservation of a* " *power to reduce tolls*, should they so increase, at the rates " first fixed as to become excessive," &c. *Boston & Lowell R. R. Co.* v. *Salem & Lowell R. R. Co.*, 2 Gray, 33.

The Supreme Court of Connecticut, upon the same subject said, " By the original charter of the company, *no* " *power was reserved by the legislature*, to repeal, alter, or " modify it, nor to impose additional burdens upon the " corporation, after they had complied with the terms " of the grant, &c. * * * Ever since the case of *Dart-* " *mouth College* v. *Woodward* was decided by the National " Court, recognizing the charters of private corporations " as contracts protected from invasion by the constitution " of the United States, no other court in this country has " disregarded the doctrine; and we consider it now as ob- " ligatory and settled beyond our reach, either to deny or " disregard, even if any of us should doubt its original " propriety. * * * Therefore, although it may be " be true, to create a private corporation *without a reserved* " *legislative power over its charter, is an act of improvident* " *legislation, yet the judiciary has no remedial powers to* " *apply*." *Washington Bridge Co.* v. *The State*, 18 Conn., 64.

In deciding the case of the *Phila., Wilm. and Balti. R. R. Co.* v. *Bowers*, 4 Houst., 506, the Supreme Court of Delaware, in treating this same question of the right and power of the company to fix its rates of transportation, said, " Of such a power it is hardly enough to say that it " is one of value and importance to the company; *it is one* " *essential to the enjoyment of the franchise*, and must be " presumed to be the consideration for which corporators

" accepted the charter, invested their money, and assumed " the obligations imposed upon them. It was undoubt- " edly competent for the Legislature, *by a provision in the* " *charter, to reserve to itself the right to supervise and regu-* " *late in the future this power of the company;* but upon a " careful examination of the original acts incorporating " the several companies now composing the Philadelphia, " Wilmington and Baltimore Railroad Company, we are " unable to find in them *any reservation of such legislative* " *control*," &c.

The same doctrine has been asserted, with great emphasis, by this Court. *The State Bank of Ohio* v. *Knoop*, 16 How., 380, was ably argued by eminent counsel, and an exhaustive opinion delivered by Mr. Justice McLEAN upon the precise questions involved in this case. In respect to the power of the Legislature to intermeddle with the provisions of a charter, he said, " Every valuable " privilege given by the charter, and which conduced to " an acceptance of it and an organization under it, is *a* " *contract which cannot be changed by the Legislature,* " *where the power to do so is not reserved in the charter.*"

Such was the law when appellant entered into the contract with the State of Iowa, under which it expended millions of dollars in preparation for the performance of the duties it had assumed by its charter; and such the parties to the contract must be presumed to have understood the law to be.

The charter granted to the company the right to fix the rates of compensation by contract with passengers and shippers, and reserved to the Legislature no power of control in that regard; and I respectfully submit that, this being so, the act passed by the Legislature of Iowa, fixing maximum rates of freights and fares, does impair the obligation of the contract, and is unconstitutional, null and void.

"When," said Chief Justice SHAW, "such a contract "has been made by the Legislature, upon considerations "of an equivalent public benefit, and when the grantees have "advanced their money to the public upon the faith of it, "the State is bound, upon the plain principles of justice, "*faithfully to respect all grants and rights thus created and* "*vested by contract.*" *B. & L. R. R. Co.* v. *S. & L. R. R. Co.*, 2 Gray, 34.

II.

In the case of *Munn et als.* v. *The People*, which is said to govern this case, the right of the Legislature to prescribe the rates of freight and fares for transportation on railroads, seems to be referred to the general police powers of the State. The language of the opinion is: "From "this source come the police powers, which, as was said "by Chief Justice TANEY in the license cases, (5 How., "583,) 'are nothing more or less than the powers of gov- "ernment inherent in every sovereignty, * * that is "to say, * * the power to govern men and things.'

"Under these powers the government regulates the con- "duct of its citizens, one towards another, and the man- "ner in which each shall use his own property, when such "regulation becomes necessary for the public good. In "their exercise it has been customary in England from "time immemorial, and in this country from its first colo- "nization, to regulate ferries, common carries, hackmen, "bakers, millers, wharfingers, inn-keepers, &c., and in so "doing to fix a maximum charge to be made for services "rendered, accommodations furnished, and articles sold."

Declining to enter upon a discussion of any of the pursuits referred to, except common carriers, and confining myself to one class of them, viz, incorporated railroad companies, I beg leave most respectfully to suggest, what I believe to be true, that not an instance can be found in

this country in which the rates of transportation have been prescribed by legislative enactment as a police regulation; or in which it has been decided by any court, either State or Federal, that fixing the rates of freights and fares on a railroad was a police power; or that such control could be exercised by the Legislature in virtue of the general police powers of the State. In all cases in which the control has been exercised by Legislatures, and sanctioned by the courts, the power has been claimed under the charter of the particular company, or under some pre-existing constitutional or statutory provision which subordinated the company to legislative regulation in that regard.

I shall trouble the Court with but few remarks, and few authorities on this point.

The police power is the power by which the good order of society is secured; the general behavior of the people regulated; good neighborhood, good manners and decency preserved; health protected; nuisances prevented; and crimes and misdemeanors detected and punished.

To this power I freely admit that the appellant, and the appellant's road, are fully and completely subject. But I deny that any right, privilege, or power, which it was competent for the Legislature to grant, and which it did grant to the company by its charter, can be either revoked, or limited and restrained by virtue of the police power.

In *Thorpe* v. *Rutland & Burlington R. R. Co.*, 27 Vt., 140, Chief Justice REDFIELD delivered an elaborate opinion, asserting and maintaining the unlimited power of the Legislature over the police of the road; in which is found, in respect to fares and freights, this significant passage:

" It must be conceded, that all which goes to the *consti-*
" *tution of the corporation, and its beneficial operation, is*
" *granted by the Legislature and cannot be revoked, either*
" *directly or indirectly, without a violation of the grant,*
" *which is regarded as impairing the contract, and as pro-*

" *hibited by the United States Constitution.* And if we " suppose the Legislature to have made the same grant to " a natural person which they did to the defendants, which " they may undoubtedly do, it could scarcely be supposed " that they thereby parted with any general legislative " control over such person, or the business secured to him. " Such a supposition, when applied to a single natural per- " son, sounds almost absurd. But it must, in fact, be the " same thing when applied to a corporation, however ex- " tensive. In either case, *the privilege of running the road,* " *and taking tolls, or fare and freight, is the essential fran-* " *chise conferred. Any act essentially paralyzing this fran-* " *chise, or destroying the profits therefrom arising, would no* " *doubt be void.* But beyond that, the entire power of the " legislative control resides in the Legislature, unless such " power is expressly limited in the grant to the corpora- " tion, as by exempting their property from taxation, in " consideration of a share of the profits, or a bonus, or the " public duties assumed." 145–6.

And again, on page 149, same case, Judge REDFIELD says:

" This police power of the State extends to the protec- " tion of the lives, limbs, health, comfort and quiet of all " persons, and the protection of all property within the " State. According to the maxim, *sic utere tuo ut alienum* " *non lædas*, which being of universal application, it must, " of course, be within the range of legislative action to " define the *mode and manner* in which every one may so " use his own as not to injure others."

Thus has Judge REDFIELD, strongly and vividly marked the boundaries between laws which regulate the police of a road, and laws which touch the essential privileges granted by the charter, one of which is the right to contract with passengers and shippers for freights and fares.

In the first case, " the entire power of the legislative

" control resides in the Legislature, unless such power is " expressly limited in the grant to the corporation."

In the second case, no act can be passed limiting or impairing the right to operate the road and collect fares and freights, unless such legislative control has been expressly reserved in the charter. It cannot be done by virtue of the police power, for it is, in no sense, a police regulation.

If so, the Legislature may, by virtue of the same power, fix the prices of all labor and all commodities. There is, in fact, no limit to their power, and no imagining the evils which would be certain to result from its possession and exercise.

In *Railroad Company* v. *Fuller*, 17 Wall., 567, a State law which required railroad companies to fix the rates of transportation on their roads, and post the same at the stations on a given day, was objected to as unconstitutional.

This Court sustained the law, but did it expressly on the ground that it was merely a police regulation, and made no attempt to *control the rates which might be charged.*

The Court is also referred to 4 Bl., 162.

Cooley's Const. Lim., 574, *et seq.*

2 Bouv. Law Dic., 348.

State v. *Noyes*, 47 Me., 214 to 216.

Benson v. *The Mayor, &c.*, 10 Barb., 245.

T. W. & W. R. W. Co. v *Jacksonville*, 67 Ills., 40.

P. W. & B. R. R. Co. v. *Bower*, 4 Houst., 506.

(It is, perhaps, proper for me to say that the italics in the quotations I have made, are my own.)

I have thus endeavored to establish the following propositions:

1. That the company, under the grants of its charter, had the right to construct and operate its road, and to fix the rates of freight and fares thereon.

(That it exercised the right, unquestioned, for more than twenty years, and that the Legislature passed laws to compel it to do so, ought to be conclusive evidence of the truth of this proposition.)

2. That where a railroad company, by virtue of its charter has the right to fix the rates of freight and fares for transportation on the road, that right can neither be taken away, or limited in its use, by the Legislature, unless legislative control over it has been expressly reserved in the charter, or by pre-existing constitutional or statutory provision.

3. That by virtue of the police powers of the State, the Legislature connot prescribe and regulate the rates of fares and freight for transportation on the railroads of the State.

If I have succeeded in making good these propositions, then a re-hearing ought to be granted.

The questions involved in the case are, beyond controversy, of more than passing and ordinary importance. They affect the tenure and value of property reaching in value to thousands of millions of dollars. And the economical and political influences of the opinion, if adhered to, will be scarcely, if any, less important than the pecuniary considerations.

If the doctrines of the opinion are to become the permanent rules of law for the government of railroad property, there can be no doubt that one effect will be materially to depreciate the value of such property, and strongly to repel capital from such investments, and to give a serious check to the extension of railroad facilities in this country. Another effect will inevitably be to drive railroad corporations into the arena of politics. For the protection of their own interests their influence will be felt in every political caucus and convention, and still more perniciously in the halls of legislation. Absolute legislative control over the

rates of transportation will be a continual suggestion and temptation to unscrupulous legislators to blackmail the railroad companies, and to the corporations to placate legislators by pecuniary, and all other appliances and influences, through which they can be reached.

The opinion gives us nothing that can at all compensate for these certain evils.

On the other hand the evils to come from leaving the control of rates with the companies, are but imaginary. The country has, as yet, had no just cause of complaint in this regard; and should abuses arise, the courts are open for their correction. The judicial tribunals possess full and ample power to redress all grievances growing out of the abuse of corporate powers, without any of the attendant evils which are certain to flow from legislative intermeddling.

It is hoped that the very great and exceptional importance of the case may induce the Court to grant a rehearing.

All which is respectfully submitted.

O. H. BROWNING,
For Petitioner.